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In re Ap

MARIA

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For Cor
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Stephen
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Adopted:

By the
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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re Applications of

MARIA M. OCHOA File No. BPH-890615ME

FOOTHILLS BROADCASTING, INC. File No. BPH-890616MR

For Construction Permit for
New FM Station, Channel 277A,
Lenoir, North Carolina

Appearances

Stephen T. Yelverton, on behalf of Maria M. Ochoa; and, *Lawrence J. Bernard, Jr.*, on behalf of Foothills Broadcasting, Inc.

DECISION

Adopted: March 31, 1995; Released: April 17, 1995

By the Review Board: MARINO (Chairman) and GREENE.

Board Chairman MARINO:

1. This case returns to the Review Board on the exceptions of Maria M. Ochoa (Ochoa) to the *Supplemental Initial Decision* (*S.I.D.*), 9 FCC Rcd 3100 (ALJ 1994), of Administrative Law Judge Walter C. Miller (ALJ) granting the application of Foothills Broadcasting, Inc. (Foothills) for a new FM station at Lenoir, North Carolina. Foothills' application was remanded for further hearing to determine whether Foothills, or its principal Steve Frank, intended to deceive the Commission concerning Foothills' access route to its proposed transmitter site. *Maria M. Ochoa*, 9 FCC Rcd 56 (1993). Ochoa now contends in her exceptions that the ALJ should have disqualified Foothills under the remand issues, and that the ALJ also erred in not specifying an additional misrepresentation issue against Foothills. After close review, we find that the record evidence supports the ALJ's *S.I.D.*, and we deny Ochoa's exceptions for the reasons set forth below.

2. The remand issues are as follows:

> (a) Whether Foothills Broadcasting, Inc. and or/Steve Frank attempted to deceive the Commission by representing, in an opposition pleading filed on June 30, 1993 and an attached affidavit and in the "Summary" filed on July 16, 1993 as an attachment to an opposition to a strike motion, that Mr. Frank had secured assurance of access to Foothills' proposed transmitter site by procuring a declaration of consent from Clyde Keyes;
>
> (b) Whether Steve Frank and/or Foothills misrepresented, in a pleading filed with the Commission on June 30, 1993, the duration of the interval between the communication of Hennessee's oral and written notices of refusal;
>
> (c) Whether Foothills lost reasonable assurance of access to its proposed transmitter site for more than 30 days and violated 47 CFR 1.65 by failing to report this.

9 FCC Rcd at 61.

3. *Supplemental Initial Decision.* In brief, the ALJ held first that Foothills had a reasonable basis for believing that it could acquire Keyes' property for a right-of-way to the site and did not misrepresent the facts or attempt to deceive the Commission about its access to the transmitter site. *S.I.D.*, 9 FCC Rcd at 3102 ¶ 31, 3103 ¶ 3 Concls. Frank did not misrepresent the interval of time between Hennessee's oral and written denials of access, the ALJ held, rejecting Hennessee's testimony in this regard as "inherently inconsistent." *Id.* at 3101 ¶ ¶ 12-16. Finally, the ALJ held that Foothills never lost reasonable assurance of access to its transmitter site and did not violate 47 CFR § 1.65. *Id.* at 3103 ¶ 3 Concls.

4. The ALJ's findings as to the relevant events are as follows. In late 1987, Foothills initiated action to obtain an FM station at Lenoir, North Carolina, petitioning the Commission to allot FM channel 277A to that community. *Id.* at 3101 ¶ 17. At that time, Foothills' consulting engineer, William Culpepper, sent Frank engineering material to assist in locating a transmitter site that complied with the Commission's rules. *Id.* Culpepper indicated that Warrior Mountain was one of three logical choices for the site. *Id.* Frank then consulted the county land records and learned that an acquaintance, Dr. Gerald Bolick, owned land that extended to the ridge of the mountain. *Id.* at ¶ 18. Frank contacted Bolick and asked to view his land to ascertain whether it was suitable for use as a transmitter site. *Id.* Bolick agreed and suggested that Arvil Greene, a landowner with a road leading to the mountain top, accompany them. *Id.* at ¶ ¶ 18-19. All three traveled to Bolick's land. *Id.* at 19. Once there, Bolick and Greene showed Frank where their lands abutted at the crest of the mountain. *Id.* Greene told Frank that the road was available for access to the site if the Bolick land was used. *Id.*

5. The next year, 1988, Greene divided his land on the mountain and sold it to his children and their spouses; Frank was unaware of the transactions. *Id.* at ¶ 20. Following the Commission's grant of Foothills' rulemaking petition in 1989, Frank arranged to have Bolick's land surveyed, securing Greene's consent for the surveyors to use the access road. *Id.* 3101-02 at ¶ 21. Greene did not tell Frank he no longer owned the land. *Id.* at 3102 n.4. Foothills then entered into an agreement with Bolick for use of his land as the Foothills transmitter site and filed its application in June 1989. *Id.* at 21.

6. The applications were designated for hearing in November 1990, and by February 1991 only Foothills, Ochoa, and Gateways remained. *Id.* at ¶ 22. In February 1991, at the suggestion of counsel, Foothills challenged Ochoa's financial qualifications after learning that Ochoa, who also proposed to use Bolick's land, had not estimated the costs of obtaining electric power and road access to the site. *Id.* Frank was asked to obtain these cost items. *Id.* He assumed that Ochoa would use Greene's access road because it was

already in existence, and he contacted Greene to get permission to have a contractor prepare an estimate for improving the road. *Id.* at ¶ 23. Frank was informed by Greene that the land had been sold and that he must ask Hennessee for permission if he wanted permanent access to use the road. *Id.* at ¶ 24. Frank contacted Hennessee on or about February 25, 1991, and learned that Foothills would not be able to use the road for access to the site. *Id.* at ¶ 25.

7. Frank conveyed the information concerning Hennessee's refusal to Foothills' counsel, who was concerned that neither Foothills nor Ochoa would have access to the site. *Id.* at ¶ 26. Frank assured him, however, that there were numerous landowners whose land abutted the crest of Warrior Mountain. *Id.* Counsel suggested that Frank secure a declaration from one of the landowners along with a cost estimate. *Id.* Frank recontacted Hennessee and asked for the written statement that no one could use the road, and Hennessee signed the statement dated February 27, 1991. *Id.* at ¶ 27. After rechecking the land records, Frank concluded (albeit mistakenly) that Keyes' land adjoined Bolick's land. *Id.* at ¶ 28. Frank met with Keyes and stated that Foothills might want to use some of Keyes' land to construct a rough road leading to the top of the mountain where Foothills was planning to build a radio tower. *Id.* at ¶ 29. On March 4-5, 1991, Frank had surveyors plot a road across Keyes' land to a point on the mountain where he believed that Bolick's land had joined Greene's. *Id.* at ¶ 30. Keyes agreed to make the land available and signed the March 7, 1991 declaration to that effect. *Id.* at 29. It was only after the August 1993 declaration from Keyes that Frank discovered he had been in error that the two lands did not adjoin one another. *Id.* at 30. In late 1993, Foothills chose to use another road to the site which provided a more direct access, and was less expensive than constructing an entirely new road over Keyes' land. *Id.* at ¶ 34. Foothills purchased the access land, built the road to the site, constructed the station, and began operating in September 1993. *Id.*

8. *Exceptions.* Ochoa charges that a *de novo* review of the record is required because the ALJ showed bias against Ochoa and her witnesses in certain orders he issued. Br. at 14-15. As to the merits, Ochoa contends that the ALJ erred in rejecting the testimony of Greene, Hennessee, and family members, and in accepting the testimony of Frank. She argues that Frank's testimony was uncorroborated, self-serving, and outright disingenuous. Br. at 16. Ochoa further contends that the *S.I.D.* erred in finding both that Foothills had a *bona fide* agreement with Keyes for access to its tower site and that Foothills made a reasonable mistake in assuming that Keyes' property abutted the proposed tower site. *Id.* at 20-22. Finally, Ochoa argues that the ALJ should have disqualified Foothills for misleading and candorless representations in its responses to Ochoa's motions. Br. at 22-23.

9. *Discussion.* Where an applicant fails to utilize the specified procedures provided by the Commission in Section 1.245 of its Rules, 47 CFR § 1.245, governing disqualification of a presiding ALJ, but nonetheless raises the matter of bias in its brief and exceptions for the first time, the Board's general practice is to strike those exceptions that seek "through the back door to cast serious aspersions on the integrity of the presiding ALJ with undocumented maledictions in a forum in which the ALJ cannot respond." *Aspen FM, Inc.*, 5 FCC Rcd 3196 at ¶ 4 (Rev. Bd. 1990) (subsequent history omitted). Consistent with that practice, we shall, *sua sponte*, strike those portions of Ochoa's exceptions alleging bias. In any event, the rulings cited to show bias (FCC 94M-33, released January 26, 1994; FCC 94M-66, released February 9, 1994; FCC 94M-114, released March 7, 1994; and FCC 94M-426, released June 30, 1994) fail to demonstrate that the ALJ "in some measure adjudged the facts as well as the law of the particular case in advance of hearing it," which would have required his recusal. *Metropolitan Council of NAACP v. FCC*, No. 93-1471, slip op. at 18 (D.C. Cir. January 27, 1995). Nonetheless, we have carefully reviewed the record with special care and due deliberation. *Cf. Nancy Naleszkiewcz*, FCC 95-33, at ¶ 4, released February 3, 1995; *Center for Study and Application of Black Economic Development*, FCC 95R-01, at ¶ ¶ 7, 21-22, released March 17, 1995.

10. Turning to the merits, the ALJ's resolution of this case in favor of Foothills was in part predicated on his observations of the witnesses appearing at the hearing: Foothills principals Frank, John Beall, and Wallace Respess; and Ochoa witness Allen Hennessee. Foothills also submitted into evidence the depositions of Clyde Keyes and Dr. Gerald Bolick, and Ochoa adduced the depositions of Arvil Greene and two of his adult children, Maynard Greene and Juanita Dare Greene Sparks. Because the ALJ is the only adjudicative official who observes the witnesses, his credibility findings are entitled to considerable weight and deference and may not be upset by the Board unless the reversal is supported by substantial evidence. *See Ramon Rodriguez and Associates, Inc.*, 9 FCC Rcd 3275, 3275 ¶ 4 (Rev. Bd. 1994) (subsequent history omitted). Here, not only do Ochoa's exceptions fail to demonstrate that the record contains substantial evidence to support overturning the ALJ's credibility findings, but our own very close review of the record evidence persuades us that the preponderance of the evidence fully supports the ALJ's findings and conclusions.

11. Foothills claims it received permission to use Greene's access road during the trip up Warrior Mountain to view the transmitter site in 1987. Ochoa, on the other hand, argues that the trip was in 1989 and immediately afterward Hennessee, the new owner, denied access. She contends that the ALJ erred in failing to accept Arvil Greene's recollection of the trip. Greene recalled at his deposition that he, Bolick, and Frank went up the mountain to see Bolick's land but said that the trip occurred after he sold his land in 1988. Ochoa Exh. R-4 at 7, 10. He stated he also told Frank, when asked about a right-of-way, that Frank would have to see his heirs about that since he had sold the land. *Id.* at 10.

12. Credible evidence establishes the trip, the only one made by Greene, was in 1987. Significantly, Bolick, whose impartiality is undisputed, recalled at his deposition that, although he was uncertain as to the exact date Frank and Greene accompanied him to view his land for use as Foothills' transmitter site, he remembered that Frank had indicated on the trip that he had received topographical maps a few days earlier. Foothills Exh. R-15 at 5-6, 15. The record shows that Foothills' consulting engineer, William Culpepper, transmitted those maps to Frank on December 22, 1987. Foothills Exh. R-11 at 12. Bolick also recalled that the trip was before the 1988 transfer of Greene's land to his children including Hennessee. Foothills Exh. R-15 at 12. Bolick suggested Greene accompany them to the site because Greene owned the access road. *Id.* at 10. Bolick also responded, when queried, that he could not remember that Greene ever indicated on their trip that anyone else

owned the access road. *Id.* at 12-13. The record reflects Greene sold his land in July 1988. Foothills Exh. R-9 (warranty deed conveying land to Hennessee). Greene had also sold some of his land earlier in 1985 but that is not the sale referred to by the parties. Bolick recalls being contacted by the surveyors at the time Greene's land was divided in 1988 because the surveyors wanted to survey the line that separated the two properties, and he further remembered seeing the whole Greene family in the fields with the surveyors and counted 28 members of the family. Foothills Exh. R-15 at 12.

13. Bolick's testimony also supports Frank's claim that Greene consented on the 1987 trip to allow Foothills to use his access road. Bolick testified that the three of them discussed using Greene's road and other potential routes for access, and that it was Bolick's understanding that the more likely access would come through Greene's property. Foothills Exh. 15 at 9-10. When asked by Ochoa's counsel to clarify what Greene actually told Frank about use of the road, Bolick responded:

> Well. I can't quote him. This length of time I don't know the specific words that he said, but he definitely indicated that it would be. Now, I can't say that definitely yes, he said this road is here, or how he said it, but he -- he did -- when I say indicate, that means that everybody believed it was there, and that's the way we do things here.

Id. at 18. Bolick stated that he also assured Frank on the trip, that if Foothills wanted to use his property to get to the site, that was a possibility, but if Foothills could find better ways to get there, easier access to the property, that was also agreeable to him. *Id.* at 7. He understood Foothills would cross the Greene property. *Id.*

14. We are persuaded that the ALJ correctly declined to accord weight to Greene's contrary deposition testimony. Greene stated he was 77, and openly acknowledged that his "remembrance ain't near as good as it was used to be. My age is getting -- ain't near as good as it one time was." Ochoa Exh. R-4 at 14-15, 21. When asked why he was insistent that the trip occurred in 1989 rather than 1987, he replied: "Well, that's what the -- that's what they all say, any how." *Id.* at 23. Asked to clarify, he stated: "Well, all the young uns says that when it was. That's all I know. I can't remember that good." *Id.* When asked whether he and Hennessee had recently spoken about what Frank had told Greene about using the land for the tower, Greene responded: "Yes. He said something about it, yes." *Id.* at 10. Questioned further about what was said, he answered: "I don't remember now, I've got so much on me. *** I don't remember. I ain't going to tell you if I don't know." *Id.*

15. In addition to Greene's concession of a waning memory, we note also that his recollection of the time and content of the conversations differs substantially from the date of Culpepper's letter and Bolick's testimony that Greene never mentioned on the trip that the land belonged to anyone else and that they all understood Foothills could use the road. *See* paras. 12-13, above; *see also Ramon Rodriguez and Associates, Inc.*, FCC 95-25, released January 30, 1995 at ¶ 20 (Commission credited testimony corroborated by impartial witness where opposing testimony did not square well with undisputed facts).

16. Ochoa further contends that, in crediting Frank's version that his conversations with Hennessee occurred in 1991 rather than 1989 as claimed by Hennessee and that the interval of time between Hennessee's oral and written denials of access was less than 30 days rather than 60 days noted in Hennessee's declaration of May 31, 1993, which gave rise to issues (b) and (c), *see* para. 2, above, the ALJ "grossly distort[ed] and mischaracterize[d] Hennessee's testimony" as "inherently inconsistent." Br. at 13. She argues that Hennessee explained an apparent discrepancy at deposition and hearing between Hennessee's written statement of February 27, 1991 denying Foothills access, and his original declaration that he orally denied Foothills access in 1989 and sent the written statement 60 days thereafter. *Id.* According to Ochoa, the 60-day interval between oral and written refusals refers to a *second* oral refusal by Hennessee to Frank in early 1991. *Id.* Ochoa contends that Hennessee failed to clarify the apparent discrepancy in the original declaration because he was in a hurry and wanted to make it as short as possible. *Id.*

17. We disagree that the ALJ mischaracterized or distorted Hennessee's testimony. In the May 31, 1993 declaration attached with Ochoa's motion to enlarge issues, Hennessee averred that, in the early part of 1989, he orally advised Frank that Foothills could not use his property to get to its site, and "gave this [written] statement to [Frank] approx. 60 days after our first contact." Foothills Exh. R-1 at 6. The written statement bears the date of February 27, 1991. Later, when shown the February 27, 1991 written statement at a deposition taken February 1, 1994, Hennessee claimed that he orally denied Frank permission in the spring of 1989 to use the road, but that Frank called him over the next month and "probably three or four occasions" afterwards. Ochoa Exh. R-5 at 13-14. Hennessee asserted that he kept saying no and then did not hear anything from Frank until after January 1, 1991, right before he prepared his written statement. *Id.* at 14. He acknowledged there may have been less than a 60 day interval from the time Frank asked for the written statement and when he prepared the statement, declaring he might have gotten the written statement back to Frank within two weeks or a month. *Id.* at 16. Hennessee insisted that it was around January 1991 that Frank recontacted him and requested the written statement because he, Hennessee, reconstructs dates by "relat[ing] things to ... events that happen[ed] to [him]." *Id.* at 9. Thus, for example, he selected the spring 1989 date for his first meeting with Frank by relating it to a renovation at his place of employment, which his supervisor stated occurred in July 1989. *Id.* at 13. Hennessee picked the January 1991 date for Frank's reappearance by relating it to the Christmas of 1990 and New Year's day of 1991, around which time, he said, his employer and wife separated. *Id.* at 14-15. As it turns out, Hennessee was mistaken as to the date his supervisor and wife separated by a whole year. Foothills placed into evidence the divorce judgment of Hennessee's supervisor that showed the separation occurred on December 30, 1989, or more than fourteen months prior to the February 1991 written statement. *See* Foothills Exh. 16; *see also* Tr. 1271, 1276-77.

18. Moreover, the inconsistencies between Hennessee's deposition and hearing testimony about his preparation of the 1993 declaration for Ochoa detract considerably from the reliability of his testimony. Hennessee stated at deposition that he had prepared the 1993 declaration after receiving a telephone call from Ochoa and that she later picked

it up at his place of employment. Ochoa Exh. R-5 at 8, 10. He averred in this version *Ochoa was not present when he prepared the statement. Id.* at 8. Questioned again at hearing why he had not indicated in the 1993 declaration there was a year and a half interval between the times of Frank's purported first contact in 1989 and the second contact in 1991, Hennessee answered he was "trying to get [the statement] all on one page" because he "was in a hurry, [he] was at work and this women came and wanted me to do something and [he] was trying to accommodate her but [he] was on [his] job and [he] was trying to get back to it." Tr. 1308, 1310. In this version he stated *he signed the statement in Ochoa's presence.* Tr. 1310-1311. In light of the disparities cited above, we cannot fault the ALJ's observation that Hennessee's testimony was inconsistent.

19. There is also documentary evidence refuting Hennessee's recollection that it was the spring of 1989 when he first informed Frank that Foothills could not use his land to access its site. *See* Foothills Exh. R-11 at 19-23. Those documents consist of: (a) an invoice from the Blue Ridge Electric Membership Corporation dated February 19, 1991 as to cost estimates of installing power across Greene's land to the transmitter tower; (b) a copy of Frank's daytimer calendar for much of February 1991, which includes reminders to call Hennessee on Wednesday, February 13 and Friday, February 15, 1991, as well as a note to see Hennessee on February 25, 1991; and (c) Hennessee's declaration of February 27, 1991 denying Foothills access to use the road. As noted from the ALJ's findings, *see* ¶ 7, above, Frank had indicated that he only learned about Hennessee's ownership of the access road in 1991 when at the behest of counsel he had sought to obtain electrical and access road improvement cost estimates in a possible attack on Ochoa's financial qualifications. He claimed he had contacted Greene in 1991 to ask his permission for the contractor to look at the road and, at that time, Hennessee denied access. The daytimer calendar notes of February 13, 15, and 25, 1991 lend support to Frank's testimony that he was advised orally by Hennessee in February 1991 that Foothills could not use the Greene access road.

20. Ochoa's final challenge to the ALJ's rejection of Hennessee's testimony relates to Hennessee's purported memory lapses cited by the ALJ at ¶ ¶ 13-14 of the *S.I.D.* The ALJ recited two examples: (1) that Greene accompanied Frank up Warrior Mountain again in 1993, which Greene denies; and (2) that Greene's son, Otis, accompanied Frank, Bolick, and Greene on their trip, which none of the latter three corroborated. Ochoa claims the lapses are unsupported by the record, but argues that, even if the examples are correct, the discrepancies in "peripheral details" of a witness' testimony are not decisionally significant. Br. at 11-13. Our review of the record shows that the ALJ's findings fairly reflect the witness' testimony. Tr. 1316-18, 1327. In sum, the ALJ was correct in according no more than minimal weight to Hennessee's testimony. Hennessee's conflicting testimony is insufficient to support a finding of misrepresentation. *See generally Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 (Rev. Bd. 1990) ("[d]isqualification for misrepresentation is ... not to be triggered unless substantial evidence clearly reveals serious and deliberate falsehoods") (subsequent history omitted).

21. Ochoa next contends that the Commission placed the burden of proof on Foothills, and that even if the testimony of Greene and Hennessee is rejected, such disbelief "would not supply a want of proof for the other party with the burden of proof." Ochoa Br. at 16-17. In this regard, she initially claims the *S.I.D.* finding at ¶ 15 that Frank's testimony "makes sense," contradicts the ALJ's earlier determination "at the hearing that it did *not* make sense for Frank to have gone to Greene in 1987 to obtain permission for access to the proposed tower site at the time of filing the petition for rulemaking, which was two years prior to the filing of the Foothills' application." Br. at 17. That argument mischaracterizes what the ALJ said at hearing. He did not say that "permission [from Greene] would plausibly have been obtained in 1989 at the time of filing the application." *Id.* Rather, the ALJ merely pointed out that Foothills was under no necessity to secure a transmitter site in 1987. Frank explained that he was only a minority partner in Foothills and wanted to be certain that Foothills could find a suitable transmitter site before asking his partners "to invest a lot of their money into a big poker game, basically, which is what the comparative process was." Tr. 1381, 1382.

22. Ochoa's second point challenges the ALJ's observation at ¶ 15 of the *S.I.D.* that Frank's testimony "harmonizes" with the Hennessee's February 1991 written refusal. She argues that the document does not indicate when Frank was *first* denied permission, and that Hennessee claimed he denied such permission in 1989. Br. at 17-18. This argument has already been fully addressed at paras. 16-20, above. Third, she argues that the other Foothills' principals failed to corroborate Frank's testimony as to when he first approached Greene or Hennessee. Br. at 18. A review of the transcript citations proffered by Ochoa shows that the other principals did not contradict Frank's testimony; only that they had no present recollection of when Frank first spoke with Greene or Hennessee. Fourth, Ochoa asserts that the purported year and a half delay from the time Frank was orally denied access and his efforts to secure a written denial from Hennessee resulted because Foothills wanted to file a motion to enlarge against Ochoa but was legally foreclosed from doing so until 1991, Br. at 19-20. This argument is rejected as sheer speculation and contrary to record evidence showing that there was no undue delay. *See* para. 19, above. The remainder of Ochoa's challenges to Frank's testimony are mere quibbles to the ALJ's findings, which findings fairly reflect the record evidence. There is sufficient record evidence to show that Foothills met its burden of proof on the issues.

23. Ochoa also contends that the ALJ erred in concluding that Foothills never lost reasonable assurance of access to its proposed tower site nor made any misrepresentations or lacked candor concerning its declaration, dated March 7, 1991, from Clyde Keyes stating that Keyes would allow Foothills to use his property to gain access to the proposed site. Br. at 11. Foothills had submitted the declaration in filings with the Commission in 1993 in recounting its action taken after it received Hennessee's written statement denying access. Ochoa's motion seeking the misrepresentation issue regarding Keyes [issue (a) above] had included a subsequent affidavit from Keyes, dated August 5, 1993, in which Keyes revoked any permission for Foothills to have any easement or right-of-way across his land; stated he had believed, when signing the earlier declaration, that Foothills intended to purchase a portion of his land on which to construct the transmitter; and denied he had any intention of granting a road right-of-way across his land to serve any transmitter constructed on any adjoining land. 9 FCC Rcd at 60 ¶ 23. Under no circumstances would he permit

an easement for a roadway across his land to serve a transmitter that might be placed on land not presently owned by or purchased from him. *Id.* Keyes also stated that his land does not join the Bolick property. *Id.* Ochoa charges that Foothills never had any intention to use Keyes' property and that the purpose of the Keyes' declaration was to thwart a Commission inquiry as to Foothills' tower site access after the issue had been raised in her 1993 motion to enlarge, *Id.* at 20-21. She adds that Foothills had no *bona fide* agreement with Keyes for access to the proposed site because he had not conducted detailed negotiations with Keyes. *Id.* at 20.

24. The contentions are without merit. Initially, Ochoa's allegations concerning Foothills' motives are sheer speculation and unsupported by the record. Prior to the 1993 controversy before the Commission about the access road, Foothills expended both time and money in 1991 to ensure access to its site through Keyes' land. There is no evidence that Foothills did not intend in 1991 to purchase Keyes' land for access to its site. To the contrary, the documentary evidence supports Frank's testimony that, on learning from Hennessee in early 1991 the access road was no longer available, Frank researched the county land records and constructed composite maps elaborately piecing together the locations of lands on the north and south sides of Warrior mountain before concluding, mistakenly, that Bolick's and Keyes' properties abutted one another. Foothills Exh. R-11 at 24-25 (copy of tax maps of various land holdings on Warrior Mountain prepared by Frank). Frank testified that he then approached Keyes and obtained his oral consent to use the land. He placed a telephone work order to the surveying company on February 28, 1991 to visit Keyes' land for the purpose of plotting a right of easement to the transmitter site, arranged to meet the surveyors on Keyes's land on March 4, 1991, joined them while they plotted a road across the property to where Bolick and Greene had previously told him their lands met at the ridge of the mountain, had a county contractor visit the property and estimate the cost of preparing a road over the path the surveyors had plotted, and obtained a cost estimate for installing power lines across Keyes' land. Foothills Exh. R-11 at 9-10, R-11 at 27-28 (copies of work order and invoice with Western Carolina Surveyors, P.A. dated February 28 and March 13, 1991, respectively), R-11 at 29 (declaration of county contractor Danny Swanson dated March 9, 1991), and R-11 at 30 (copy of invoice for electrical cost estimates). Foothills principal Wallace Respess testified that Foothills later learned there was a better route than the one through Keyes' land. Foothills' decision to purchase that land tract was primarily based on economics. Foothills Exh. 13 at 4. Respess stated that the distance across Keyes' property to the site was at least twice as long as the new route and that the new tract had an existing road whereas Keyes' tract did not. *Id.*

25. Keyes also clarified at his 1994 deposition why he signed the August 5, 1993 affidavit for Ochoa. He stated he knew Foothills already had access to Bolick's property and thought he might still be able to sell the property to Ochoa to go across his land. Foothills Exh. R-14 at 17. Keyes declared that he "went along with some of the things" in the affidavit because he knew it would make no difference because Foothills had access to the site and would not be asking him for the right-of-way. *Id.* at 22-23. Keyes made it clear, however, that he was in the land development business, that the land was still on the market, and that he would still sell it to Foothills to work out a right-of-way or roadway if they wanted to purchase it. *Id.* at 18, 25.

26. Ochoa's *bona fides* argument is also to no avail. The remand order stated that Foothills only needed to have "reasonable grounds to believe that necessary rights of access were obtainable." 9 FCC Rcd at 60 ¶ 25. Ochoa does not dispute that Keyes agreed to make his land available in March of 1991. Moreover, as noted at para. 13, above, Bolick had previously assured Frank in 1987 that he had land available if Foothills wished to use it for access to the site. Foothills Exh. 15 at 7. That was all that was necessary.

27. Ochoa further contends that the *S.I.D.* erred in finding that Foothills had made a reasonable mistake in assuming that Keyes' property abutted Bolick's property. Br at 21. She argues that Frank failed to ask Keyes about the matter or have field surveys done and could not have had any reasonable or good faith belief as to the access to the proposed site. *Id.* We find no merit in Ochoa's contention. Frank constructed composite maps of the properties on both sides of Warrior Mountain and arranged for plotting a right of easement to the site. *See* para. 24, above. He further testified that his experience in plotting Keyes' land to the ridge line where Greene and Bolick had shown him their lands met assured him that his determination of the alignment of the properties was correct. Tr. 1487. Moreover, the parties do not dispute that the county land maps in this case are difficult to utilize, particularly in matching the location of land holdings on the south side of the mountain *vis a vis* the north side, because the maps are prepared for townships and the mountain ridge is the boundary between the north and south townships. Foothills Exh. R-13 at 3. Respess, for example, testified that when Foothills decided to purchase the land currently used to access the site, a survey of the property showed that the land abutted Bolick's property, whereas their prepared map showed that the properties were at least 1800 feet apart. *Id.* at 4. Contrary to Ochoa's contention *see* Br. at 22, there is no evidence that Frank was careless or reckless in assuming the properties abutted and must be disqualified.

28. Ochoa's final argument is that the ALJ ignored misleading and candorless representations made by Foothills in responsive pleadings. Br. at 22-23. She refers to several inconsistencies between Frank's testimony and Foothills' opposition motions (Exhs. R-4, R-6), as well as an error in Frank's declaration and a purported inaccuracy in Respess' declaration attached to Foothills' Exhibit R-2. She further contends that the testimony of the Foothills principals showed a pattern of inconsistencies, evasion, and deceit, adverting to two examples: (1) alleged differences in the testimonies of Respess and Beall whether they had discussions with each other prior to Beall's deposition; and (2) a purported suggestion in Frank's direct testimony that he verified land records in 1987 as to the proposed site versus his testimony that it was 1991. Br. at 23. We discern no error on the part of the ALJ. There must be a clear showing of deceptive intent to support a finding of misrepresentation or lack of candor constituting disqualifying conduct. *See Ramon Rodriguez and Associates, Inc.*, 9 FCC Rcd at 3277 ¶ 13. The bare existence of a mistake in the application or pleadings is insufficient to warrant disqualification. *Id.* The record establishes that Frank did not review the opposition motions that summarized certain facts slightly different than Frank's testimony. Tr. 1454-56, 1461. And, for the remainder of the alleged inconsistencies or evasions, we agree with Foothills' reply that Ochoa's

"claims are supported only by semantic quibbling over the meaning of certain words used in pleadings and declarations." Foothills' Reply Br. at 21. A fair review of the testimony of the Foothills principals does not show evidence of any deceptive intent.

29. *Exception to ALJ Ruling.* Ochoa contends that the ALJ should have added still another misrepresentation issue against Foothills predicated on the failure of Foothills' stockholder, John Beall, to work as the station's part-time general manager, as represented to the Commission in Foothills' comparative case. Ochoa's motion to the ALJ included the affidavits of Donnie Goodale and Patrick Crawley in support for an issue. Goodale, the sole stockholder of a station that competes with Foothills' Lenoir station, alleged he "personally visited [Foothills' station] and John Beall did not have an office at the station at the time." Goodale claimed that he is acquainted with Beall and, based on his knowledge, Beall "is not working at [the station] 20 hours or more per week" and "spends most of his time at other business activities." Goodale further asserted that "Reta Thorn is the actual station manager and manages the station on a day to day basis." Crawley averred that he visited the station and, after inquiring who the station manager was, received a business card for Reta Thorn, Station Manager. He looked around and saw only two offices, one with a name plate for Greg Ryan, program director, and the other, which contained a name plate for Reta Thorn, station manager.

30. The ALJ denied the motion, ruling that Ochoa failed to plead with the sufficiency and specificity required by 47 CFR § 1.229 (d). *Memorandum Opinion and Order,* FCC 94M-05, released January 6, 1994. He stated that Goodale had failed to demonstrate that he was in a position to observe Beall's activities. The ALJ also noted that Goodale was wrong because Thorn denied managing the station on a day-to-day basis. The ALJ found Crawley's affidavit replete with *non-sequiturs* and unsupported irrelevancies. Ochoa argues that the ALJ's ruling ignored that: (1) the affiants specifically alleged based on personal knowledge that Beall did not have an office and that the receptionist referred to Thorn as the manager; and (2) Beall admitted he was not working at the station 20 hours per week as promised and did not have an office. Br. at 24.

31. Section 1.229(d) of the Commission's Rules requires that motions to enlarge issues shall contain specific allegations of fact sufficient to support the action requested and that such allegations shall be supported by affidavits of persons having personal knowledge thereof. As correctly noted by the ALJ, the affidavits were facially deficient to support addition of an issue. Contrary to Ochoa's assertion, Goodale did not establish that he had personal knowledge that Beall was not working at the station 20 hours per week. Additionally, Crawley's assertions, even if accurate, would not support the addition of an issue since no one disputes that Thorn is the station manager. In Foothills' response denying the allegations, Beall averred in sworn declaration under penalty of perjury that he had served as general manager since the station's September 27, 1993 sign-on; that he had devoted more than 20 hours per week on average to the station; and that Thorn reports to him directly on a daily basis. Contrary to Ochoa's claim in its exceptions, Beall made no concession he was not working at the station 20 hours per week. A copy of the station's business card identifying him as the station's general manager was attached to his declaration. Beall stated that the door to his present office is in the bookkeeper's office and not visible from the hall of their suite. Thorn averred in her sworn declaration that following a stint as consultant to Foothills until the station began broadcasting, she took a position as the station's station manager, where she has worked part-time under Beall's direction and supervision. She stated that Beall has been involved in every aspect of the formation of the station, and until his present office was completed in November 1993, he shared her office and used other space in Foothills' suite.

32. ACCORDINGLY, IT IS ORDERED, That the Motion for Acceptance of Revised Version of Reply to Exceptions to Supplemental Initial Decision, filed September 21, 1994, by Foothills Broadcasting, Inc. IS GRANTED, and the reply IS ACCEPTED; and, that the application of Foothills Broadcasting, Inc. (File No. BPH-890616MR) for a construction permit for a new FM station at Lenoir, North Carolina IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-89

In re Applications of

AURIO A. MATOS — File No. BPH-911114MS
LLOYD SANTIAGO-SANTOS and — File No. BPH-911115MP
LOURDES RODRIGUEZ BONET

For Construction Permit for
New FM Station, Channel 293A,
Culebra, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1995; Released: April 19, 1995

By the Review Board: MARINO (Chairman) and GREENE.

1. The Review Board has before it a Joint Request for Approval of Settlement Agreement filed March 8, 1994 by Aurio A. Matos (Matos) and Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet (Santiago & Rodriguez) as supplemented on July 22 and August 15, 1994 and amended on February 6 and 15, 1995. The Mass Media Bureau filed comments on April 28 and August 4, 1994 and February 24, 1995. Matos and Santiago & Rodriguez responded to the Bureau's comments on May 9 and August 22, 1994. Also before the Board are: a Statement for the Record filed January 28, 1994 by Matos; Mass Media Bureau's Motion to Reopen the Record and Enlarge Issues filed January 28, 1994, an opposition thereto filed February 7, 1994 by Matos, and a reply filed February 16, 1994 by the Bureau; Petitions for Leave to Amend filed February 7, April 14, May 5, and May 23, 1994 by Matos and comments thereon filed February 15 and June 2, 1994 by the Bureau; and Mass Media Bureau's Motion to Dismiss filed April 12, 1994.

2. By Memorandum Opinion and Order released October 11, 1994, the Review Board disapproved the settlement agreement as supplemented in 1994 because the consideration included consulting agreements with Santiago and Rodriguez without providing assurance that work would be done under the agreements and that the anticipated compensation would be appropriate for the anticipated work, the consultants' experience, and the time involved. *Aurio A. Matos*, 9 FCC Rcd 5764 (Rev. Bd. 1994). The settlement agreement provided for payment by Matos for Santiago & Rodriguez' reasonable and prudent expenses up to $50,000, and the additional payment provided for by the consulting agreements would have substantially exceeded the documented expenses. The parties' February 6, 1995 amendment specifically eliminates the consulting agreements from the settlement and limits the consideration to be paid by Matos to $50,000, a sum represented to be less than the reasonable and prudent expenses incurred by Santiago & Rodriguez in preparing and prosecuting their application.[1] The settlement agreement as amended contemplates a grant of Matos' application and dismissal of the Santiago & Rodriguez application in exchange for the payment. No other consideration is promised or contemplated.

3. The Bureau argues that the reimbursement amount must be reduced by the amount reflected in an invoice for legal services from Isabel Rodriguez Bonet, Esq. because the invoice fails to describe the professional services rendered. (MMB's Further Com. on Jt. Req. for Approval of Settlement Agree. at 2 (Feb. 24, 1995).) This point was first made in the Bureau's comments filed August 4, 1994. The parties responded on August 22, 1994 and included a letter from Miss Rodriguez describing her services and how she computed her fee. (Letter from Rodriguez to Rasmussen of 8/10/94, Response to Comments of Mass Media Bureau, Exh. B (Aug. 22, 1994).) The Bureau raised no further objections. After reviewing the showing, the Board found that no questions remain about the reimbursable expenses under the settlement agreement. 9 FCC Rcd at 5764 ¶ 4. In their February 15, 1995 Further Amendment at Exh. B, the parties included a new invoice from Miss Rodriguez showing additional professional services and related expenses for documents prepared for the settlement agreement. The Bureau has raised no objection to this additional showing and we see no basis for disallowing these additional expenses.

4. In January 1994 the Bureau moved to reopen the record and add reporting (section 1.65) and transmitter site issues against Matos. Matos had proposed to use a site on a national wildlife refuge but was informed by the United States Department of Interior, Fish and Wildlife Service (FWS), in December 1993 that the site would not be available because of the proximity of the site to endangered sea turtles and plant species. (Letter from Davis to Matos of 12/13/93, MMB's Mot. to Reopen the R. and Enlarge Issues, Exh. 1 (Jan. 28, 1994).) The Bureau argues that, although Bureau counsel advised counsel for Matos of this letter on December 22, 1993, Matos failed to report this change with a timely amendment to his application. The Bureau does concede, however, that Matos served a copy of the letter on counsel for Santiago & Rodriguez on January 20, 1994 pursuant to a continuing document production request. (Mot. to Reopen at 2). This was accompanied by a letter from Matos' counsel explaining he had been delayed because he had been out of town for a family emergency. (Mot. to Reopen, Exh. 2).

5. Matos responded to the Bureau's motion by explaining he had quickly sought a new site after learning of the FWS decision not to grant a special use permit for using the existing tower. He obtained reasonable assurance of the site on January 3, 1994, completed the necessary engineering study by January 11, 1994, and filed a Petition for Leave to Amend with an amendment to the new site on February 7, 1994. (Declaration of Aurio A. Matos (2/6/94), Attach. to

[1] The February 15, 1995 amendment clarifies that the settlement agreement is contingent on grant of Matos' application as amended on February 7, 1994 to specify a new site and as further amended on May 23, 1994 to conform the tower height to the height approved by the FAA.

Letter from Cinnamon to Caton of 3/7/94). He also argued that he was under no obligation to report after receiving the FWS letter because the letter was the equivalent of a predetermination letter under the procedures for the FWS. Matos had the right to oppose the letter and, if still unsatisfied, appeal further within the FWS before a determination would become final. *See* 50 C.F.R. §§ 25.45(b), (c), 29.22. Matos also said he had been advised by counsel that he might be able to co-locate his antenna on the existing tower without FWS permission because the tower was the personal property of Station WSAN and his proposal did not involve subletting any FWS land. Matos also argued that the Bureau failed to offer even speculation at to why he would intend to conceal information from the Commission that was known to the Bureau and that he had transmitted to the parties within thirty days of receiving it. Rather than delay service by litigating the Fish and Wildlife Service letter, Matos chose to pursue a different site. (Matos Opp. to Mot. to Reopen R. and Enlarge Issues (Feb. 7, 1994); Matos Pet. for Leave to Amend (Feb. 7, 1994).)

6. The Bureau responded that the amendment complied with all applicable technical requirements but pointed out that Matos had not received FAA approval. (MMB's Com. on Pet. for Leave to Amend at 2, 3 (Feb. 15, 1994).) This proved to be a problem and, on April 14, 1994, Matos advised the Commission that he intended to reduce his tower height at the FAA's request. (Pet. for Leave to Amend (Apr. 14, 1994).) He received an FAA Determination of No Hazard at the reduced height on May 4, 1994. (Pet. for Leave to Amend (May 5, 1994).) On May 23 he amended the technical portion of his application to be consistent with the height approved by the FAA. Pet. for Leave to Amend (May 23, 1994). The Bureau advised that this amended proposal complies with all applicable technical requirements. (MMB's Com. on Pet. for Leave to Amend (Jun. 2, 1994).)

7. Although interjecting no objection to Matos' amendment on technical grounds, the Bureau has not abandoned its argument that a reporting issue should be added against Matos for failing to amend its application with a copy of the Fish and Wildlife Service letter. (MMB's Further Com. on Jt. Req. for Approval of Settlement Agree. (Feb. 24, 1995).) We disagree. Even if Matos should be faulted for not amending his application, we see no evidence here of any deceptive intent which would turn this into disqualifying misconduct. Simply stated, there was no secret to keep. The Bureau had a copy of the letter, which Matos knew, and Matos served it on opposing parties. *See Rem Malloy Broadcasting*, 9 FCC Rcd 4822, 4826 ¶ 17 (Rev. Bd. 1994),[2] citing *Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n.9 (1984), *modifying criteria in* 55 RR 2d 23, 25 ¶ 3 (1983) (inquiry into reporting violation justified only when prima facie showing has been made of intent to conceal or significant carelessness regarding decisionally significant matter).

8. The Bureau also argues that Matos did not establish good cause for his amendment as required by 47 C.F.R. § 73.3522(b), and so, in spite of his amendment, does not have a site. (MMB's Com. on Pet. for Leave to Amend (Feb. 15, 1994).) The Bureau's reasoning is that the Fish and Wildlife Service ruling was foreseeable because Matos knew it had been trying to reduce or eliminate the tower Matos initially proposed. The Bureau does not say when or how Matos would have learned this, and we are unaware of any statement to this effect from the FWS to Matos before the December FWS letter. Santiago & Rodriguez had attached to their exceptions a letter to their counsel from the Refuge Manager stating that Station WSAN cannot transfer its privileges under its special use permit, but this letter does not indicate that the FWS would not favorably consider an application from Matos. (Letter from Rice to Rasmussen of 7/16/93, Exceptions, Exh. 3.) Indeed, in a subsequent letter intended to dispel any impression that the FWS might have decided not to issue a special use permit to Matos, the Refuge Manager made clear that her earlier letter "did not discuss . . . whether the Fish and Wildlife Service (FWS) would or would not issue a Special Use Permit to [Matos]." Letter from Rice to Cerazo of Nov. 5, 1993, Reply Except. to I.D. of Aurio A. Matos, Exh. A (Dec. 20, 1993).) The Rice letter went on to explain that it is FWS policy not to make determinations on the merits of a request before it has the request in hand, and the time for seeking a special use permit would be after receiving an FCC license. Matos quickly applied for a permit after the presiding officer below issued an initial decision granting his application. When Matos received the response from the FWS denying his request, he quickly and reasonably elected to change his site rather than experience the delay involved in litigating over the FWS site. Until he received the FWS decision, he had permission from Station WSAN to use its tower and the expectation that the FWS would have no objection to the co-location of an antenna on an existing tower. *See Alden Communications Corp.*, 3 FCC Rcd 3937, 3938 ¶ 10 (1988), *aff'd by judgment*, 917 F.2d 62 (D.C. Cir. 1990). Matos' actions have not been unreasonable and do not defeat the good cause of his amendment.

9. With the acceptance of Matos' February 7, 1994 amendment to specify a new site, as modified by his May 23, 1994 amendment to conform to the tower height approved by the FAA, there is no impediment to granting approval of the settlement agreement as amended on February 6, 1995 and further amended on February 15, 1995. The parties' Joint Request for Approval of Settlement Agreement, as amended fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 that govern settlement agreements. The parties have stated under penalty of perjury that there is no other consideration for dismissal of the Santiago & Rodriguez application other than the contemplated payment of the Santiago & Rodriguez expenses, they did not file their applications for the purpose of entering into a settlement agreement, and approval of the agreement would permit the early establishment of a new radio service in Culebra. Santiago & Rodriguez have further stated under penalty of perjury that the proposed payment is less than their legitimate and prudent expenses in prosecuting their application, and they have submitted supportive documentation showing that their expenses exceed the proposed $50,000 expense reimbursement.

10. ACCORDINGLY, IT IS ORDERED That the Joint Request for Approval of Settlement Agreement, filed March 8, 1994 by Aurio A. Matos (Matos) and Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet (Santiago & Rodriguez), as supplemented July 22, 1994 to show Santiago & Rodriguez' expenses, and as amended February

[2] *Request for review dismissed*, 10 FCC Rcd 503 (1995).

6. 1995 and further amended February 15, 1995 IS GRANTED, and the attached Settlement Agreement as amended August 16, 1994 (Exh. A to Response to Comments of Mass Media Bureau filed August 22, 1994 by Matos and Santiago & Rodriguez), February 6, 1995, and February 15, 1995 IS APPROVED; that the Supplement to Joint Request for Approval of Settlement Agreement filed August 15, 1994 by Matos and Santiago & Rodriguez IS REJECTED.

11. IT IS FURTHER ORDERED That the Mass Media Bureau's Motion to Reopen the Record and Enlarge the Issues filed January 28, 1994 IS DENIED; and that the Mass Media Bureau's Motion to Dismiss filed April 12, 1994 IS DISMISSED.

12. IT IS FURTHER ORDERED That the Petitions for Leave to Amend filed April 14 and May 5, 1995 by Matos ARE GRANTED; that the Petition for Leave to Amend filed February 7, 1994 as further amended by the Petition for Leave to Amend filed May 23, 1994 by Matos IS GRANTED, and the amendment as further amended IS ACCEPTED.

13. IT IS FURTHER ORDERED That the Statement in Support and Contingent Exceptions to Initial Decision of Aurio A. Matos filed December 3, 1994 and the Exceptions of Lloyd Santiago-Santos and Lourdes Rodriguez Bonet filed December 6, 1994 ARE DISMISSED; and that the Motion to Strike filed December 27, 1993 by Santiago & Rodriguez IS DISMISSED as moot.

14. IT IS FURTHER ORDERED That the application of Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet (File No. BPH-911115MP) IS DISMISSED; that the application of Aurio A. Matos (File No. BPH-911114MS), as amended, IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

1995 Annual Access Tariffs

United States Telephone Association
Application for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 16, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 24, 1995, the United States Telephone Association (USTA) filed an application for waiver of Part 69 of the Commission's Rules[1] to allow local exchange carriers (LECs) subject to price cap regulation to file their annual interstate access tariffs 30 days following the release of the Commission's Order in the *Price Cap Performance Review for LECs* proceeding,[2] with the tariffs to be effective July 1, 1995. In particular, USTA seeks a waiver of Section 69.3(h) of the rules,[3] which requires LECs subject to price cap regulation to file a price cap tariff for access service annually with a minimum of 90 days' notice and a scheduled effective date of July 1. For the reasons discussed below, we grant USTA's request to delay the filing date, and, on our own motion, we also establish an August 1, 1995 effective date for the 1995 price cap LECs' annual access tariffs.

II. BACKGROUND

2. USTA states that it is the principal trade association of the exchange carrier industry and that its members include all of the LECs subject to federal price cap regulation.[4] USTA notes that the Common Carrier Bureau (Bureau) recently adopted the Tariff Review Plans document (*1995 TRP*),[5] which sets forth summary cost support material the LECs must file to support their annual access charge tariff filings, which are due on or before March 31, 1995.[6] USTA also notes that in the *1995 TRP*, the Bureau observed that the *LEC Price Cap Performance Review* proceeding is pending before the Commission.[7] USTA asserts that the Commission is considering changes to the price cap rules in that proceeding, and that such changes would affect the 1995 tariff filings of price cap LECs as well as the cost materials required to support those filings.[8]

3. USTA claims that if the LECs subject to price cap regulation file their annual access tariffs and the summary cost support material specified in the *1995 TRP* by March 31, 1995, there is a significant likelihood that those LECs will be required to refile their tariffs to reflect the changes to the price cap rules adopted by the Commission in the *LEC Price Cap Performance Review* proceeding.[9] Therefore, USTA requests a limited waiver of the 90 days' notice requirement of Section 69.3(h) and recommends that LECs subject to price cap regulation be allowed to file their 1995 annual access tariffs 30 days following the release of an Order in the *LEC Price Cap Performance Review* proceeding. USTA states that permitting price cap carriers to delay filing their annual access tariffs until the Commission adopts price cap rule changes will serve the public interest by eliminating the need for the price cap carriers to make two annual access tariff filings, reducing the administrative burden on the Commission's staff of having to review two sets of cost support material, and preventing any confusion to interested parties that might be caused by each LEC filing two 1995 access tariffs.[10]

4. On March 3, 1995, two parties filed comments on the USTA application – AT&T Corp. (AT&T) and MCI Telecommunications Corporation (MCI). AT&T states that it does not object to USTA's waiver request provided that the Commission makes a corresponding revision in the current deadline for AT&T's annual price cap filing.[11] In this regard, AT&T observes that under the Commission's rules, it is required to file its annual price cap tariff by May 17, 1995.[12] AT&T explains that because access costs are a key component of its price cap computation, the Commission adopted this schedule to assure that AT&T would have adequate time to incorporate the LECs' proposed annual access rate changes into its own price cap calculation.[13] AT&T argues that grant of USTA's waiver request would undermine the Commission's prescribed filing schedule by seriously reducing its "window in which to evaluate the effects on its own access costs of the price cap LECs' filed rates."[14] Therefore, AT&T argues that the Commission should grant USTA's waiver request only if it simultaneously extends the deadline for AT&T to submit its annual price cap filing until 30 days after the price cap LECs file their proposed annual access tariffs.[15]

5. MCI opposes USTA's application. It claims that if the Commission were to grant USTA's waiver request and authorize the price cap LECs to file their 1995 annual access tariffs 30 days following the release of an Order in the *LEC Price Cap Performance Review* proceeding, the Commission would reduce the amount of time that the Commission's staff would have to ensure that the LEC tariffs are just and lawful.[16] Moreover, MCI argues, the LECs should be required to file their access tariffs as

[1] 47 C.F.R. Part 69.
[2] *See* Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, CC Docket No. 94-1, 9 FCC Rcd 1687 (1994) (*LEC Price Cap Performance Review*).
[3] 47 C.F.R. § 69.3(h).
[4] USTA Application at 1.
[5] *See* Cost Support Material To be Filed with 1995 Annual Access Tariffs, Tariff Review Plans, DA 95-264 (rel. Feb. 17, 1995) (*1995 TRP*).
[6] USTA Application at 1.
[7] *Id.* at 1-2.
[8] *Id.* at 2.
[9] *Id.*
[10] *Id.* at 2-3.
[11] AT&T Comments at 2.
[12] *See* 47 C.F.R. §§ 61.43, 61.58(c)(1).
[13] AT&T Comments at 3.
[14] *Id.*
[15] *Id.* at 4.
[16] MCI Comments at 3.

scheduled because some of the key components of the filing will probably not be revised by the Commission in the *LEC Price Cap Performance Review* proceeding.[17] MCI therefore recommends that the price cap LECs be required to file their access tariffs on March 31, 1995, as scheduled, and then to refile the tariffs after the release of the Commission's Order in the *LEC Price Cap Performance Review* proceeding.[18]

6. On March 6, 1995, the National Exchange Carrier Association (NECA) filed a letter commenting on USTA's application. NECA points out, among other things, that its carrier common line (CCL) rate and its calculation of non-pooling carriers' Long Term Support obligations are directly dependent on the tariff filings of the price cap LECs, which are responsible for establishing the national average CCL rate. While NECA supports USTA's waiver request, it argues that if the Commission extends the effective date of the price cap LECs' annual access tariffs, the Commission should also extend the effective date of NECA's tariffs as well as other related items to ensure that its filings include accurate rates and underlying costs.[19]

7. USTA filed a reply addressing MCI's comments on March 10, 1995. USTA disagrees with MCI that the grant of its waiver request would reduce the time needed to review the LECs' price cap tariff filings.[20] In any event, USTA asserts that if the *LEC Price Cap Performance Review* Order is not released in time to provide MCI and others adequate opportunity to review the annual access tariffs, the Commisison on its own motion can extend the July 1 tariff effective date.[21]

III. DISCUSSION

8. Commission rules may be waived for good cause shown.[22] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[23] In addition, the United States Court of Appeals for the District of Columbia Circuit has stated that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[24] Waiver is thus appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.[25]

9. As the Bureau indicated in the *1995 TRP*, a final Report and Order in the *LEC Price Cap Performance Review* proceeding is pending before the Commission. Moreover, the Bureau stated that, "if the FCC adopts any changes to the price cap rules that would affect the 1995 filings and necessitate a revision to the TRP, [the Bureau] will modify the price cap TRP accordingly."[26] We agree with USTA that if the LECs subject to price cap regulation file their 1995 annual access tariffs by March 31, they may be required subsequently to submit another annual access tariff filing, including revised cost support material, to reflect rule changes that the Commission may adopt in the *LEC Price Cap Performance Review*. We also agree with USTA that requiring LECs to submit two annual access tariffs within a short period of time would impose an undue administrative burden on the price cap LECs, the Commission's staff, and interested parties. Accordingly, we find that it would serve the public interest to permit the price cap LECs to file their 1995 annual access tariffs 30 days following the release date of the Commission's Report and Order in the *LEC Price Cap Performance Review* proceeding.

10. We also agree with MCI that our decision to extend the deadline for the filing of price cap annual access tariffs should not deprive MCI and other interested parties of an adequate opportunity to review and comment on the tariff filings. Therefore, we are waiving *sua sponte* Section 69.3(h) of the Commission' Rules,[27] to extend the scheduled effective date of the LEC price cap tariffs from July 1 to August 1. This extension will ensure that interested parties and the Commission's staff have sufficient time to review the LECs 1995 annual access tariff filings. Any adjustments that LECs may have to make in their 1995 tariffs to reflect the additional month that their 1994 tariff will be in effect will be clarified in a further Order.

11. We emphasize here that neither of our actions taken in this Order -- extending the filing deadline for the 1995 access filings and the tariffs' effective date -- applies to LECs not subject to price cap regulation. As those carriers' annual access tariffs will not be affected by the Commission's Report and Order in the *LEC Price Cap Performance Review* proceeding, they must file their tariffs on at least 90 days' notice with a scheduled effective date of July 1.[28] For their 1995 filings, this means that the LECs not subject to price cap regulation must file their annual access tariffs on or before March 31. Finally, we will address NECA's request that we extend the effective date of NECA's tariffs in the *LEC Price Cap Performance Review* Order.

12. With respect to AT&T's request that we extend the deadline for AT&T to submit its annual price cap filing, we conclude that this is not the appropriate proceeding in which to consider AT&T's request. If AT&T believes that a waiver of the rules is warranted for its annual price cap filing, it should seek such a waiver in a formal request to the Commission. This approach will ensure that interested parties have an opportunity to comment on AT&T's request. Therefore, we do not consider in this Order AT&T's request for an extension of its price cap filing deadline.

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, and 0291, the application for waiver filed by the United States Telephone Association IS GRANTED, to the extent provided herein and IS DENIED in all other respects.

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17 *Id.* at 4.
18 *Id.*
19 NECA Letter at 2.
20 USTA Reply at 2.
21 *Id.*
22 *See* 47 C.F.R. § 1.3.
23 *See Northeast Cellular Tel. Co. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).
24 *WAIT Radio v. F.C.C.*, 418 F.2d. 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).
25 *Northeast Cellular*, 897 F.2d at 1166.
26 *1995 TRP* at 2.
27 47 C.F.R. § 69.3(h).
28 47 C.F.R. § 69.3(a).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Southwest Cable Television II
Los Angeles, California — CUID No. CA0253, Area H

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 16, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Southwest Cable Television II ("Century") was charging for its cable programming service ("CPS") tiers in Los Angeles, California, CUID No. CA0253, Area H. Century has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Century's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely complaint was served on Century on September 26, 1993.[11] The Commission received the complaint on October 8, 1993.

5. Century states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier, Century stated that it began offering twelve channels on an individual, or a la carte, basis. These a la carte channels could also be purchased collectively as one twelve-channel package (Century Select 12) or in two packages of six channels each (Century Select 6A and 6B). This restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Century in Beverly Hills and Los Angeles, California.[12] In the LOI order, we found that the retiering in Beverly Hills and Los Angeles constituted an evasion of rate regulation. We concluded that Century's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. Based upon this decision, and in response to our December 29, 1994 Public Notice,[13] Century filed an FCC Form 393 for Los Angeles, Area H, for the first time on February 7, 1995, in which it treated the twelve-channel package of a la carte channels as a CPS tier.

6. On February 23, 1995, Century amended its FCC Form 393 in response to a Commission letter which re-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Century has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Century implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed September 26, 1993 and states that it was mailed to Century on that date. Century has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider September 26, 1993 as the service date.

[12] *Century Southwest Cable TV, Beverly Hills and Los Angeles, California*, LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures With Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

quested clarification of Century's showing.[14] On February 27, 1995, Century submitted documents explaining that Century had further restructured its service offerings on April 1, 1994. Specifically, Century removed the Arts and Entertainment ("A&E") channel and Video Hits 1 ("VH1") channel from the Century Select packages and replaced those channels with Court TV and ESPN2. A&E and VH1 were instead offered as a separate, two-channel CPS tier for $1.34 per month (plus franchise fee). This newly-created A&E/VH1 Satellite Tier was provided free of charge to subscribers who purchased seven or more Century Select channels.

7. On January 23, 1995, Century filed an Application for Review which argued that the Commission should reverse the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles. Century then filed a motion on January 26, 1995 requesting the Bureau to defer action on the complaints pending against its CPS rates in Beverly Hills and Los Angeles until the Commission rules on the Application for Review.

III. DISCUSSION

8. In its amended benchmark filing of February 23, 1995, Century calculated a maximum permitted rate for the Century Select 12 tier of $6.57 per month (plus franchise fee). Century did not, however, attempt to justify either its monthly price of $4.00 (plus franchise fee) for the Century Select 6A and 6B tiers or its monthly price of $1.34 (plus franchise fee) for the A&E/VH1 Satellite Tier. Upon review, we have determined that Century miscalculated its maximum permitted per-channel rate, and it is therefore appropriate to make the following adjustments to Century's calculations in Form 393:

a. According to a supplemental schedule attached to its Form 393, Century's benchmark calculation for its regulated offerings as of September 1, 1993 (Form 393, Part II, Worksheet 1, Line 121) was based upon 43 regulated channels and 27 satellite channels. A review of Century's channel line-up card, effective September 1, 1993, verified a total of 43 regulated channels. However, Century did not identify on the channel line-up card which of the regulated channels were delivered by satellite. Based upon our count, we found that there were 21 satellite channels instead of 27. This adjustment reduces the benchmark channel rate entered on Line 121 of Worksheet 1. Since Worksheet 1 calculates the average base rate per channel on the initial date of regulation, the channels added to the line-up on April 1, 1994 were not included in determining the benchmark calculation.

b. Century's benchmark calculation for its regulated offerings as of September 30, 1992 (Form 393, Part II, Worksheet 2, Line 220) was based upon 35 regulated channels and 23 satellite channels. Although we were able to verify the 35 regulated channels used for the benchmark calculation, we could not verify Century's count of 23 satellite channels. Based upon our count, we reduced the number of satellite channels from 23 to 20. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

9. These adjustments have the cumulative effect of decreasing the maximum permitted monthly price for the Century Select 12 tier to $6.50 per month (plus franchise fee). Century's actual monthly charge for the Century Select 12 tier was $6.00 (plus franchise fee). Therefore, Century has demonstrated that the actual charge for this twelve-channel tier was at or below the maximum permitted rate.

10. These adjustments result in a maximum permitted rate for the Century Select 6A and 6B tiers of $3.25 per month (plus franchise fee). Century's actual monthly charge for the Century Select 6A and 6B tiers was $4.00 (plus franchise fee). In addition, we find that the maximum permitted monthly price for the A&E/VH1 Satellite Tier was $1.08 (plus franchise fee). Century's actual monthly charge for this tier was $1.34 (plus franchise fee). Thus, Century has failed to demonstrate that its actual charges for the Century Select 6A and 6B tiers and for the A&E/VH1 Satellite Tier were at or below the maximum permitted rates.

11. Since the Commission's resolution of the issues pending in Century's Application for Review could require revisions to our analysis, we will stay the effective date of this Order in response to Century's motion until the Commission has issued its decision in that proceeding. Because interest charges on any required refunds will continue to accrue during the period of this stay, Century's subscribers in Los Angeles will not be adversely affected.

IV. CONCLUSIONS

12. Upon review of the record herein, we conclude that, for the period from October 8, 1993 to May 14, 1994, Century's showing supports maximum reasonable CPS tier prices of $6.50 per month (plus franchise fee) for the Century Select 12 tier and $3.25 per month (plus franchise fee) for the Century Select 6A and 6B tiers. We further conclude that, for the period from April 1, 1994 to May 14, 1994, Century's showing supports a maximum reasonable price of $1.08 per month (plus franchise fee) for the A&E/VH1 Satellite Tier.[15] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amounts they paid in excess of a reasonable price for the CPS tiers.

13. We further conclude that Century must file an FCC Form 1200 rate filing for the period after May 14, 1994 which reflects the fact that Century's prices as of March 31, 1994 were unreasonable.[16] We reserve the right to make further adjustments to Century's prices for the period after May 14, 1994, upon completion of our review of Century's rate justification for that period.

[14] Letter from Julia Buchanan, FCC, to Seth Davidson, counsel for Century (February 16, 1995).

[15] These findings are based solely on the representations of Century listed in paragraphs 5 and 6, *supra*, and the modifications described in paragraph 8, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We note that Century has not yet filed a rate justification for its prices in effect after May 14, 1994.

14. We further conclude that Century has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Century of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the effective date of this Order.

15. We further conclude that the effective date of this Order will be stayed until the Commission releases a decision on Century's Application for Review of the Bureau's LOI decision regarding the treatment of Century's a la carte packages in Beverly Hills and Los Angeles.

16. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 26, 1993 complaint against the cable programming service prices charged by Century Southwest Cable Television II in Los Angeles, California, CUID No. CA0253, Area H, and all other complaints relating to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

17. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television II with respect to Los Angeles, California, CUID No. CA0253, Area H, for the period of October 8, 1993 to May 14, 1994, justifies maximum prices of $6.50 per month (plus franchise fee) for the Century Select 12 tier and $3.25 per month (plus franchise fee) for the Century Select 6A and 6B tiers.

18. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television II with respect to Los Angeles, California, CUID No. CA0253, Area H, for the period April 1, 1994 to May 14, 1994, justifies a maximum price of $1.08 per month (plus franchise fee) for the A&E/VH1 Satellite Tier.

19. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Century Southwest Cable Television II shall refund to subscribers for the period October 8, 1993[18] to May 14, 1994, that portion of the amounts paid for cable programming service that exceeded $3.25 per month (plus franchise fee) for the Century Select 6A and 6B tiers and were thus unreasonable, offset by the amounts paid by subscribers during the same period for the Century Select 12 tier which were less than the maximum permitted price, plus interest to the date of the refund.

20. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Century Southwest Cable Television II shall refund to subscribers for the period April 1, 1994 to May 14, 1994, that portion of the amount paid for cable programming service that exceeded $1.08 per month (plus franchise fee) for the A&E/VH1 Satellite Tier and was thus unreasonable, offset by the amounts paid by subscribers during the same period for the Century Select 12 tier which were less than the maximum permitted price, plus interest to the date of the refund.

21. IT IS FURTHER ORDERED that Century Southwest Cable Television II shall determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the effective date of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

22. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Century Southwest Cable Television II shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the effective date of this Order.

23. IT IS FURTHER ORDERED that Century's motion to defer action on the complaints against its cable programming service prices in Los Angeles, California, CUID No. CA0253, Area H, is resolved as indicated herein.

24. IT IS FURTHER ORDERED that the effective date of this Order is stayed until the Commission releases a decision on Century's Application for Review of the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

V Cable, Inc. CUID No. OH0776
Willowick, Ohio

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 16, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price V Cable, Inc. d/b/a Cablevision ("Cablevision") was charging for its cable programming service ("CPS") tier in Willowick, Ohio, CUID No. OH0776. Cablevision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Cablevision's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in Willowick, Ohio, CUID No. OH0776, was completed and served on Cablevision on February 11, 1994, and received by the Commission on February 15, 1994.

5. Cablevision filed its FCC Form 393 for Willowick, Ohio, on March 11, 1994. Cablevision amended its justification on February 17, 1995, in response to a Commission letter which requested further clarification of Cablevision's amended showing.[11]

III. BACKGROUND

6. Cablevision restructured its rates in an effort to comply with the Commission's Rules on September 1, 1993. In October 1993, Cablevision changed its channel line-up on Channel 37 by deleting HSN II, a satellite channel on the CPS tier, and adding WQHS, a non-satellite channel on the basic tier. On January 1, 1994, Cablevision again changed its channel line-up by moving Channel 17, a satellite channel on the CPS tier, to the basic tier. These changes in Cablevision's channel line-up were unaccompanied by any change in Cablevision's prices for its basic and CPS tiers. Cablevision completed Part II of Form 393 using its channel line-up as of October 1993. In Part I of Form 393, Cablevision performed alternative calculations using its number of channels as of September 1, 1993, and as of October 1993.

IV. DISCUSSION

7. Cablevision acknowledges that its CPS price of $14.34 is higher than the maximum permitted price if Form 393 is calculated using the number of channels Cablevision offered as of October 1993.[12] Thus, Cablevision has failed

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Cablevision's price for the period after May 14, 1994 may be required to reflect the fact that Cablevision's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Feb. 13, 1995).

[12] Cablevision asserts that when it initially restructured its prices on September 1, 1993, it had one additional CPS channel

to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Cablevision's Form 393 filing, we have found that Cablevision has not correctly calculated its maximum permitted price as of the initial date of regulation and it is therefore appropriate to make the following adjustments to Cablevision's calculations in Form 393:

a. In its Form 393 filing, Cablevision's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) do not count Channel 30 as a regulated satellite channel. Similarly, Cablevision's calculations for its rate-regulated tiers as of September 30, 1992 (Form 393, Part II, Worksheet 2) do not count Channel 29 as a regulated satellite channel. However, according to the channel line-ups included with Cablevision's responses to complaints, as of the initial date of regulation Channel 30 carried Bravo, which is a non-rate-regulated pay-per-channel service, for 76 hours per week and carried C-Span II, which is a rate-regulated satellite service offered on the CPS tier, for 92 hours per week. The same programming in the same proportion was carried on Channel 29 as of September 30, 1992.

b. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[13]

c. Under our rules, pay channels may not be counted as regulated channels or as satellite channels.[14] However, under the preponderance-of-use test, the channel that was split between Bravo and C-Span II is not a pay channel because it was used for a rate-regulated service the majority of the programming week. Cablevision therefore should have counted Channel 30 as a satellite channel on the CPS tier on Form 393, Part II, Worksheet 1 and Part I, and it should have counted Channel 29 as a satellite channel on the basic tier on Form 393, Part II, Worksheet 2.[15]

d. Cablevision's calculations for its rate-regulated channels as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) count Channel 17 as a regulated satellite channel on the CPS tier. However, according to the channel line-ups submitted by Cablevision, Channel 17 was moved from the CPS tier to the basic tier before the filing of the first valid complaint. The channels used in completing Form 393 should be those channels offered on the initial date of regulation for each franchise area.[16] Since the change in the use of Channel 17 occurred before any complaint was filed pertaining to Willowick, that change must be reflected in the channel counts.

e. In order to correct for the net effect of the channel-counting errors discussed above, we increase the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 2, Line 220 from 22 to 23 and increase the number of total regulated channels in the same calculation from 32 to 33. We also increase the number of channels on Form 393, Part II, Worksheet 2, Line 202 from 32 to 33. On Form 393, Part II, Worksheet 1, we increase the number of total regulated channels and satellite channels used to calculate the benchmark on Line 121 from 31 to 32 and from 21 to 22, respectively. We also increase the number of channels in the basic tier on Line 102 from 10 to 11. These adjustments have the net effect of reducing the benchmark channel rates entered on Line 121 of Worksheet 1 and Line 220 of Worksheet 2 and decreasing the base rates per channel on Part II, Worksheet 1, Line 110 and Part II, Worksheet 2, Line 210.

8. Because Cablevision has failed to demonstrate that its price for the CPS tier was not unreasonable, we will set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Cablevision timely filed Form 393.[17] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.039 as the Inflation Adjustment Factor through February 1994, the base date Cablevision should have used in justifying its rate for Willowick, Ohio.

9. These adjustments have the cumulative effect of changing the maximum permitted monthly CPS tier price from $13.69 (as Cablevision calculated) to $13.61.

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and one fewer basic tier channel. If Cablevision had computed Part I of Form 393 based on the number of channels offered on September 1, 1993, its CPS price would have been equal to the maximum permitted charge as calculated in the filing. However, as recognized by Cablevision, Form 393 must be completed using the number of channels offered by the operator as of the initial date of regulation.

[13] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, at para. 6a-6c (Cab. Serv. Bur., released Nov. 9, 1994).

[14] *See General Instructions for Completing FCC Form 393*, Instruction No. 5 ("Cable programming service consists of all video programming distributed over a cable system that is not included in the basic service tier or offered on a per-channel or per-program basis"); *Instructions for Worksheet 1*, Line 121 ("For purposes of using the benchmark tables, a 'satellite-delivered signal' is any cable program service or superstation' delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel)").

[15] Cablevision offered only a single tier of programming on this system as of September 30, 1992. Channel 29 was part of this tier.

[16] *See* n.12, *supra*.

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

V. CONCLUSIONS

10. Upon review of the record herein, we conclude that Cablevision's showing supports a maximum reasonable CPS tier price for Willowick, Ohio, CUID No. OH0776 of $13.61 (plus franchise fee) for the period from February 15, 1994 to May 14, 1994.[18] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. We further conclude that Cablevision must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Cablevision's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Cablevision's price for the period after May 14, 1994, upon completion of our review of Cablevision's FCC Form 1200 rate filing.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint filed on February 15, 1994 against the cable programming service price charged by V Cable, Inc. d/b/a Cablevision in Willowick, Ohio, CUID No. OH0776, and all other complaints in the same franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filing submitted by V Cable, Inc. d/b/a Cablevision with respect to Willowick, Ohio, CUID No. OH0776, for the period beginning on February 15, 1994 and ending on May 14, 1994 justifies the maximum price of $13.61 (plus franchise fee) for V Cable, Inc. d/b/a Cablevision's cable programming service tier.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that V Cable, Inc. d/b/a Cablevision shall refund to subscribers that portion of the amounts paid for cable programming service for the period from February 15, 1994[19] to May 14, 1994 which exceeded $13.61 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that V Cable, Inc. d/b/a Cablevision shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that V Cable Inc. d/b/a Cablevision shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Willowick, Ohio, CUID No. OH0776, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price (plus franchise fee).

17. IT IS FURTHER ORDERED that V Cable, Inc. d/b/a Cablevision shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[18] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 8, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Southwest Cable Television III
Santa Monica, California — CUID No. CA0456

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 16, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Southwest Cable Television III ("Century") was charging for its cable programming service ("CPS") tiers in Santa Monica, California, CUID No. CA0456. Century has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Century's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely complaint was served on Century on October 23, 1993.[11] The Commission received the complaint on October 28, 1993.

5. Century states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier, Century began offering twelve channels on an individual, or a la carte, basis. These a la carte channels could also be purchased collectively as one twelve-channel package (Century Select 12) or in two packages of six channels each (Century Select 6A and 6B). This same type of restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Century in Beverly Hills and Los Angeles, California.[12] In those two communities, Century also created three Century Select packages consisting of twelve or six a la carte channels. In the LOI order, we found that the retiering in Beverly Hills and Los Angeles constituted an evasion of rate regulation. We concluded that Century's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. Based upon this decision, and in response to our December 29, 1994 Public Notice,[13] Century filed an FCC Form 393 for Santa Monica for the first time on February 2, 1995, in which it treated the twelve-channel package of a la carte channels as a CPS tier.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Century has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Century implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed October 23, 1993 and states that it was mailed to Century on that date. Century has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider October 23, 1993 as the service date.

[12] *Century Southwest Cable TV, Beverly Hills and Los Angeles, California*, LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures With Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

6. On February 27, 1995, Century submitted documents explaining that Century had further restructured its service offerings on April 1, 1994. Specifically, Century removed the Arts and Entertainment ("A&E") channel and Video Hits 1 ("VH1") channel from the Century Select packages and replaced those services with Court TV and ESPN2. A&E and VH1 were instead offered as a separate, two-channel CPS tier for $1.37 per month (plus franchise fee). This newly-created A&E/VH1 Satellite Tier was provided free of charge to subscribers who purchased seven or more Century Select channels.

7. On January 23, 1995, Century filed an Application for Review which argued that the Commission should reverse the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles. Century then filed a motion on January 26, 1995 requesting the Bureau to defer action on the complaints pending against its CPS rates in Beverly Hills and Los Angeles until the Commission rules on the Application for Review. On March 2, 1995, Century submitted a letter to the Bureau asking that its motion to defer action be extended to the complaints pending in Santa Monica since the same a la carte issues on appeal for Beverly Hills and Los Angeles apply to Santa Monica as well.

III. DISCUSSION

8. In its benchmark filing of February 2, 1995, Century calculated a maximum permitted rate for the Century Select 12 tier of $6.92 per month (plus franchise fee). Century did not, however, attempt to justify its monthly price of $4.00 (plus franchise fee) for the Century Select 6A and 6B tiers or its monthly price of $1.37 (plus franchise fee) for the A&E/VH1 Satellite Tier. Upon review, we have determined that Century miscalculated its maximum permitted per-channel rate, and it is therefore appropriate to make the following adjustments to Century's calculations in Form 393:

a. According to a supplemental schedule attached to its Form 393, Century's benchmark calculation for its regulated offerings as of September 1, 1993 (Form 393, Part II, Worksheet 1, Line 121) was based upon 43 regulated channels and 23 satellite channels. A review of Century's channel line-up card, effective September 1, 1993, verified a total of 43 regulated channels. However, Century did not identify on the channel line-up card which of the regulated channels were delivered by satellite. Based upon our count, we found that there were 21 satellite channels instead of 23. This adjustment reduces the benchmark channel rate entered on Line 121 of Worksheet 1. Since Worksheet 1 calculates the average base rate per channel on the initial date of regulation, the channels added to the line-up on April 1, 1994 were not included in determining the benchmark calculation.

b. Century's benchmark calculation for its regulated offerings as of September 30, 1992 (Form 393, Part II, Worksheet 2, Line 220) was based upon 35 regulated channels and 23 satellite channels. Although we were able to verify the 35 regulated channels used for the benchmark calculation, we could not verify Century's count of 23 satellite channels. Although identified as satellite channels on Century's September 1992 channel line-up card, channels 2 (KCBS), 3 (Public Access), and 16 (Santa Monica City Channel) are local broadcast and local origination channels and channel 15 (Showtime) is a pay channel. These types of channels are not included in the definition of a satellite channel provided in the Form 393 instructions for Part II, Worksheet 1, Line 121.[14] We therefore reduced the number of satellite channels from 23 to 19. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

c. Century miscalculated its Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127). Using the Gross National Product-Price Index figures published by the Department of Commerce on July 29, 1994, we calculate 1.030 as the Inflation Adjustment Factor through October 31, 1993, the latest date through which Century could have claimed inflation if it had filed Form 393 in a timely fashion.[15]

9. These adjustments have the cumulative effect of increasing the maximum permitted monthly price for the Century Select 12 tier to $7.00 per month (plus franchise fee). Century's actual monthly charge for the Century Select 12 tier was $6.00 (plus franchise fee). Therefore, Century has demonstrated that its actual charge for this twelve-channel tier was at or below the maximum permitted rate.

10. The same adjustments result in a maximum permitted rate for the Century Select 6A and 6B tiers of $3.50 per month (plus franchise fee). Century's actual monthly charge for the Century Select 6A and 6B tiers was $4.00 (plus franchise fee). In addition, we find that the maximum permitted monthly price for the A&E/VH1 Satellite Tier was $1.17 (plus franchise fee). Century's actual monthly charge for this tier was $1.37 (plus franchise fee). Thus, Century has failed to demonstrate that its actual charges for these three tiers were at or below the maximum permitted rates.

11. Since the Commission's resolution of the issues pending in Century's Application for Review could require revisions to our analysis, we will stay the effective date of this Order in response to Century's request until the Com-

[14] The instructions state:

> For purposes of using the benchmark tables, a "satellite-delivered signal" is any cable program service or "superstation" delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel). If a cable system picks up a satellite channel via a microwave or fiber optic feed, the channel remains a satellite channel if it is available by satellite unless it could be picked up directly over-the-air in the cable community.

[15] *See* Instructions to FCC Form 393, page 11, Line 124 (inflation adjustment is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form"); 47 C.F.R. § 76.956(a) (operator must file a rate justification within 30 days of service of a complaint that is not returned by the Commission).

mission has issued its decision in that proceeding. Because interest charges on any required refunds will continue to accrue during the period of this stay, Century's subscribers in Santa Monica will not be adversely affected.

IV. CONCLUSIONS

12. Upon review of the record herein, we conclude that, for the period from October 28, 1993 to May 14, 1994, Century's showing supports as reasonable its CPS tier price of $6.00 per month (plus franchise fee) for the Century Select 12 tier. We further conclude that Century's showing supports a maximum reasonable CPS tier price of $3.50 per month (plus franchise fee) for the Century Select 6A and 6B tiers for the period October 28, 1993 to May 14, 1994 and a maximum reasonable CPS tier price of $1.17 per month (plus franchise fee) for the A&E/VH1 Satellite Tier for the period April 1, 1994 to May 14, 1994.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amounts they paid in excess of a reasonable price for these CPS tiers.

13. We further conclude that Century must file an FCC Form 1200 rate filing for the period after May 14, 1994 which reflects the fact that Century's prices during the earlier period were unreasonable. We reserve the right to make further adjustments to Century's prices for the period after May 14, 1994, upon completion of our review of Century's rate justification for that period.

14. We further conclude that Century has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Century of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

15. We further conclude that the effective date of this Order will be stayed until the Commision releases a decision on Century's Application for Review of the Bureau's LOI decision regarding the treatment of Century's a la carte packages in Beverly Hills and Los Angeles.

16. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 23, 1993 complaint against the cable programming service prices charged by Century Southwest Cable Television III in Santa Monica, California, CUID No. CA0456, and all other complaints relating to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

17. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television III with respect to Santa Monica, California, CUID No. CA0456, for the period of October 28, 1993 to May 14, 1994, justifies its price of $6.00 for the Century Select 12 tier.

18. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television III with respect to Santa Monica, California, CUID No. CA0456, justifies a maximum price of $3.50 per month (plus franchise fee) for the Century Select 6A and 6B tiers for the period of October 28, 1993 to May 14, 1994 and a maximum price of $1.17 per month (plus franchise fee) for the A&E/VH1 Satellite Tier for the period of April 1, 1994 to May 14, 1994.

19. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Century Southwest Cable Television III shall refund to subscribers for the period October 28, 1993[18] to May 14, 1994 that portion of the amounts paid for cable programming service that exceeded $3.50 per month (plus franchise fee) for the Century Select 6A and 6B tiers and were thus unreasonable, offset by the amounts paid by subscribers during the same period for the Century Select 12 tier which were less than the maximum permitted price, plus interest to the date of the refund.

20. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Century Southwest Cable Television III shall refund to subscribers for the period April 1, 1994 to May 14, 1994 that portion of the amounts paid for cable programming service that exceeded $1.17 per month (plus franchise fee) for the A&E/VH1 Satellite Tier and was thus unreasonable, offset by the amounts paid by subscribers during the same period for the Century Select 12 tier which were less than the maximum permitted price, plus interest to the date of the refund.

21. IT IS FURTHER ORDERED that Century Southwest Cable Television III shall determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the effective date of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

22. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Century Southwest Cable Television III shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

23. IT IS FURTHER ORDERED that Century's request to defer action on the complaints against its cable programming service prices in Santa Monica, California, CUID No. CA0456, is resolved as indicated herein.

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[16] These findings are based solely on the representations of Century listed in paragraphs 5 and 6, *supra*, and the modifications described in paragraph 8, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

24. IT IS FURTHER ORDERED that the effective date of this Order will be stayed until the Commision releases a decision on Century's Application for Review of the Bureau's LOI decision regarding the treatment of Century's a la carte packages in Beverly Hills and Los Angeles.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Southwest Cable Television III
Los Angeles, California — CUID No. CA0253, Area F

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 16, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Southwest Cable Television III ("Century") was charging for its cable programming service ("CPS") tiers in Los Angeles, California, CUID No. CA0253, Area F. Century has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Century's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely complaint was served on Century on September 20, 1993.[11] The Commission received the complaint on September 27, 1993.

5. Century states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier, Century began offering twelve channels on an individual, or a la carte, basis. These a la carte channels could also be purchased collectively as one twelve-channel package (Century Select 12) or in two packages of six channels each (Century Select 6A and 6B). This restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Century in Beverly Hills and Los Angeles, California.[12] In the LOI order, we found that the retiering in Beverly Hills and Los Angeles constituted an evasion of rate regulation. We concluded that Century's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. Based upon this decision, and in response to our December 29, 1994 Public Notice,[13] Century filed an FCC Form 393 for Los Angeles, Area F, for the first time on February 7, 1995, in which it treated the twelve-channel package of a la carte channels as a CPS tier.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Century has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Century implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed September 18, 1993 and states that it was mailed to Century on September 20, 1993. Century has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider September 20, 1993 as the service date.

[12] *Century Southwest Cable TV, Beverly Hills and Los Angeles, California*, LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures With Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

6. On February 27, 1995, Century submitted documents explaining that Century had further restructured its service offerings on April 1, 1994. Specifically, Century removed the Arts and Entertainment ("A&E") channel and Video Hits 1 ("VH1") channel from the Century Select packages and replaced those channels with Court TV and ESPN2. A&E and VH1 were instead offered as a separate, two-channel CPS tier for $1.34 per month (plus franchise fee). This newly-created A&E/VH1 Satellite Tier was provided free of charge to subscribers who purchased seven or more Century Select channels.

7. On January 23, 1995, Century filed an Application for Review which argued that the Commission should reverse the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles. Century then filed a motion on January 26, 1995 requesting the Bureau to defer action on the complaints pending against its CPS rates in Beverly Hills and Los Angeles until the Commission rules on the Application for Review.

III. DISCUSSION

8. In its benchmark filing of February 7, 1995, Century calculated a maximum permitted rate for the Century Select 12 tier of $7.49 per month (plus franchise fee). Century did not, however, attempt to justify either its monthly price of $4.00 (plus franchise fee) for the Century Select 6A and 6B tiers or its monthly price of $1.34 (plus franchise fee) for the A&E/VH1 Satellite Tier. Upon review, we have determined that Century miscalculated its maximum permitted per-channel rate, and it is therefore appropriate to make the following adjustments to Century's calculations in Form 393:

a. According to a supplemental schedule attached to its Form 393, Century's benchmark calculation for its regulated offerings as of September 1, 1993 (Form 393, Part II Worksheet 1, Line 121) was based upon 43 regulated channels and 27 satellite channels. A review of Century's channel line-up card, effective September 1, 1993, verified a total of 43 regulated channels. However, Century did not identify on the channel line-up card which of the regulated channels were delivered by satellite. Based upon our count, we found that there were 21 satellite channels instead of 27. This adjustment reduces the benchmark channel rate entered on Line 121 of Worksheet 1. Since Worksheet 1 calculates the average base rate per channel on the initial date of regulation, the channels added to the line-up on April 1, 1994 were not included in determining the benchmark calculation.

b. Century's benchmark calculation for its regulated offerings as of September 30, 1992 (Form 393, Part II, Worksheet 2, Line 220) is based upon 34 regulated channels and 22 satellite channels. Although we were able to verify the 34 regulated channels used for the benchmark calculation, we could not verify Century's count of 22 satellite channels. Although identified as satellite channels on Century's September 1992 channel line-up card, channels 2 (KCBS), 3 (Public Access), and 35 (L.A. City Government) are local broadcast and local origination channels. These types of channels are not included in the definition of a satellite channel provided in the Form 393 instructions for Part II, Worksheet 1, Line 121.[14] We therefore reduced the number of satellite channels from 22 to 19. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

9. These adjustments have the cumulative effect of decreasing the maximum permitted monthly price for the Century Select 12 tier to $7.42 per month (plus franchise fee). Century's actual monthly charge for the Century Select 12 tier was $6.00 (plus franchise fee). Therefore, Century has demonstrated that the actual charge for this twelve-channel tier was at or below the maximum permitted rate.

10. These adjustments result in a maximum permitted rate for the Century Select 6A and 6B tiers of $3.71 per month (plus franchise fee). Century's actual monthly charge for the Century Select 6A and 6B tiers was $4.00 (plus franchise fee). In addition, we find that the maximum permitted monthly price for the A&E/VH1 Satellite Tier was $1.24 (plus franchise fee). Century's actual monthly charge for this tier was $1.34 (plus franchise fee). Thus, Century has failed to demonstrate that its actual charges for the Century Select 6A and 6B tiers and for the A&E/VH1 Satellite Tier were at or below the maximum permitted rates.

11. Since the Commission's resolution of the issues pending in Century's Application for Review could require revisions to our analysis, we will stay the effective date of this Order in response to Century's motion until the Commission has issued its decision in that proceeding. Because interest charges on any required refunds will continue to accrue during the period of this stay, Century's subscribers in Los Angeles will not be adversely affected.

IV. CONCLUSIONS

12. Upon review of the record herein, we conclude that, for the period from September 27, 1993 to May 14, 1994, Century's showing supports maximum reasonable CPS tier prices of $7.42 per month (plus franchise fee) for the Century Select 12 tier and $3.71 per month (plus franchise fee) for the Century Select 6A and 6B tiers. We further conclude that, for the period from April 1, 1994 to May 14, 1994, Century's showing supports a maximum reasonable price of $1.24 per month (plus franchise fee) for the

[14] The instructions state:

> For purposes of using the benchmark tables, a "satellite-delivered signal" is any cable program service or "superstation" delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel). If a cable system picks up a satellite channel via a microwave or fiber optic feed, the channel remains a satellite channel if it is available by satellite unless it could be picked up directly over-the-air in the cable community.

A&E/VH1 Satellite Tier.[15] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amounts they paid in excess of a reasonable price for the CPS tiers.

13. We further conclude that Century must file an FCC Form 1200 rate filing for the period after May 14, 1994 which reflects the fact that Century's prices as of March 31, 1994 were unreasonable.[16] We reserve the right to make further adjustments to Century's prices for the period after May 14, 1994, upon completion of our review of Century's rate justification for that period.

14. We further conclude that Century has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Century of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the effective date of this Order.

15. We further conclude that the effective date of this Order will be stayed until the Commission releases a decision on Century's Application for Review of the Bureau's LOI decision regarding the treatment of Century's a la carte packages in Beverly Hills and Los Angeles.

16. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 18, 1993 complaint against the cable programming service prices charged by Century Southwest Cable Television III in Los Angeles, California, CUID No. CA0253, Area F, and all other complaints relating to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

17. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television III with respect to Los Angeles, California, CUID No. CA0253, Area F, for the period of September 27, 1993 to May 14, 1994, justifies maximum prices of $7.42 per month (plus franchise fee) for the Century Select 12 tier and $3.71 per month (plus franchise fee) for the Century Select 6A and 6B tiers.

18. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television III with respect to Los Angeles, California, CUID No. CA0253, Area F, for the period April 1, 1994 to May 14, 1994, justifies a maximum price of $1.24 per month (plus franchise fee) for the A&E/VH1 Satellite Tier.

19. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Century Southwest Cable Television III shall refund to subscribers for the period September 27, 1993[18] to May 14, 1994, that portion of the amounts paid for cable programming service that exceeded $3.71 per month (plus franchise fee) for the Century Select 6A and 6B tiers and were thus unreasonable, offset by the amounts paid by subscribers during the same period for the Century Select 12 tier which were less than the maximum permitted price, plus interest to the date of the refund.

20. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Century Southwest Cable Television III shall refund to subscribers for the period April 1, 1994 to May 14, 1994, that portion of the amount paid for cable programming service that exceeded $1.24 per month (plus franchise fee) for the A&E/VH1 Satellite Tier and was thus unreasonable, offset by the amounts paid by subscribers during the same period for the Century Select 12 tier which were less than the maximum permitted price, plus interest to the date of the refund.

21. IT IS FURTHER ORDERED that Century Southwest Cable Television III shall determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the effective date of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

22. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Century Southwest Cable Television III shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the effective date of this Order.

23. IT IS FURTHER ORDERED that Century's motion to defer action on the complaints against its cable programming service prices in Los Angeles, California, CUID No. CA0253, Area F, is resolved as indicated herein.

24. IT IS FURTHER ORDERED that the effective date of this Order is stayed until the Commission releases a decision on Century's Application for Review of the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] These findings are based solely on the representations of Century listed in paragraphs 5 and 6, *supra*, and the modifications described in paragraph 8, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We note that Century has not yet filed a rate justification for its prices in effect after May 14, 1994.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b). leading.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Communications CUID No. NY0398
Mount Vernon, New York

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 17, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Paragon Communications d/b/a Paragon Cable ("Paragon") was charging for its cable programming service ("CPS") tier in Mount Vernon, New York, CUID No. NY0398. Paragon has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Paragon's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Paragon asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to the maximum permitted charge. Upon review, we have found no apparent errors that would require a recalculation of Paragon's maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Paragon Communications d/b/a Paragon Cable in Mount Vernon, New York, CUID No. NY0398 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. §543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Northern New Jersey, Inc. CUID Nos. NJ0191,
Township of Pequannock, New Jersey NJ0195, NJ0201,
Township of Ridgewood Village, NJ0204 and NJ0219
New Jersey
Borough of Bogota, New Jersey
Township of Teaneck, New Jersey
City of Clifton, New Jersey

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 17, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price TCI of Northern New Jersey, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in the New Jersey communities designated by the community unit identification ("CUID") numbers referenced above. TCI has chosen to attempt to justify its price through a benchmark showing by filing amended FCC Form 393s for each of these communities that are identical in all respects. This Order addresses the reasonableness of TCI's CPS tier price for each of these communities only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price for each of these communities after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10].

4. TCI asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in TCI's tier price exceeding its maximum permitted price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by TCI of Northern New Jersey, Inc. in the Township of Pequannock, New Jersey, CUID No. NJ0191; Township of Ridgewood Village, New Jersey, CUID No. NJ0195; the Borough of Bogota, New Jersey, CUID No. NJ0201; the Township of Teaneck, New Jersey, CUID No. NJ0204; and the City of Clifton, New Jersey, CUID No. NJ0219 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of TCI. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Multimedia Cablevision, Inc. CUID Nos. NC0134, NC0135, NC0382

Order Dismissing Complaints

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: March 20, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Multimedia Cablevision, Inc. ("Multimedia") was charging for its cable programming service ("CPS") tiers in numerous communities in North Carolina (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Multimedia offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Multimedia responded to the complaints by stating that it has no CPS tier in those systems. On March 3, 1995, Multimedia submitted information supporting its claim that CPS tiers subject to rate regulation did not exist as of September 1, 1993 and still do not exist in any of the subject communities in response to a letter from the Commission staff.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. BACKGROUND

4. The Cable Services Bureau has addressed the regulatory status of packages of channels offered on an a la carte basis in several orders resolving letters of inquiry ("LOIs") directed to cable operators. Of particular relevance to this case, the Cable Services Bureau has released orders resolving LOIs regarding Century Cable TV's ("Century") systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[11] Relying on the Commission's *Going Forward Order*,[12] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings did not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

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[1] Letter from Zenji Nakazawa, FCC, to David P. Fleming, Vice President and General Counsel, Multimedia Cablevision, Inc. (February 7, 1995).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358, 10 FCC Rcd 115 (Cab. Serv. Bur. 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354, 10 FCC Rcd 99 (Cab. Serv. Bur. 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361, 10 FCC Rcd 127 (Cab. Serv. Bur. 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360, 10 FCC Rcd 123 (Cab. Serv. Bur. 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur., released Dec. 12, 1994).

[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

5. Since the LOI orders found that the elimination of Century's CPS tiers did not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as new product tiers, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[13]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Multimedia for each of the subject communities indicate thatP Multimedia restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that Century did for the seven areas mentioned above where LOI orders have been issued. Multimedia discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for four or five channels which it offered on an a la carte basis.[14] In each of the subject communities, all of the channels in the a la carte package were previously offered on Multimedia's basic service tier.

7. We feel that we have sufficient information regarding Multimedia's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Multimedia's CPS tiers, the small number of channels that were offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Multimedia to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Multimedia in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Multimedia's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[15]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Multimedia Cablevision, Inc. in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Multimedia Cablevision, Inc. in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[13] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur., released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur., released Dec. 20, 1994).

[14] In CUID Nos. NC0134 and NC0382, Multimedia offered a five-channel a la carte package consisting of CNN, The Nashville Network, TNT, Headline News, and The Discovery Channel. In CUID No. NC0135, Multimedia offered a four-channel a la carte package consisting of CNN, The Nashville Network, TNT, and Headline News.

[15] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
NC0134	New Bern	8	18	21	0	5
NC0135	Greenville	10	17	24	0	4
NC0382	New Bern (Riverbend)	8	18	21	0	5

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Communications CUID No. NY1068
Ilion, New York

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1995; Released: March 17, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Paragon Communications d/b/a Paragon Cable ("Paragon") was charging for its cable programming service ("CPS") tier in Ilion, New York, CUID No. NY1068. Paragon has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Paragon's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable. [5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint in Ilion, New York, CUID No. NY1068 was completed and served on Paragon on September 22, 1993 and received by the Commission on October 12, 1993.

5. Paragon attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993. Paragon amended its justification on June 22, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

III. DISCUSSION

6. In its amended benchmark filing of June 22, 1994, Paragon calculated a maximum permitted rate of $14.42 per month (plus franchise fee) for the CPS tier in Ilion, New York, CUID No. NY1068. Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Paragon's actual monthly charge for its CPS tier was $14.44 (plus franchise fee). Thus, Paragon has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Paragon's showing supports a maximum reasonable CPS tier price of $14.42 per month (plus franchise fee) for the

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Paragon has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"),* the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Paragon implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Paragon's price for the period after May 14, 1994 may be required to reflect the fact that Paragon's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

period October 12, 1993 to May 14, 1994.[12] However, we further determine that the total overcharge per subscriber is such a *de minimis* amount that it would not serve the public interest to order a refund.

8. We further conclude that Paragon must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Paragon's price during the earlier period was unreasonable.[13] We reserve the right to make further adjustments to Paragon's price for the period after May 14, 1994 upon completion of our review of Paragon's FCC Form 1200 rate filing.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 22, 1993 complaint against the cable programming service price charged by Paragon Communications d/b/a Paragon Cable in Ilion, New York, CUID No. NY1068, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED that the benchmark filing submitted by Paragon Communications d/b/a Paragon Cable with respect to Ilion, New York, CUID No. NY1068, for the period of October 12, 1993 to May 14, 1994, justifies a maximum price of $14.42 per month (plus franchise fee) for the cable programming service tier.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that Paragon Communications d/b/a Paragon Cable shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Ilion, New York, CUID No. NY1068, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

12. IT IS FURTHER ORDERED that Paragon Communications d/b/a Paragon Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[12] This finding is based solely on the representations of Paragon listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[13] We reviewed King's FCC Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable CUID Nos. CA0934, CA0941, CA1022

Gardena, Torrence, and
Hawthorne, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1995; Released: March 17, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Paragon Cable ("Paragon") was charging for its cable programming service ("CPS") tier in the California communities designated by the CUID numbers referenced above. Paragon has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Paragon's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint in each community was completed and served on Paragon and received by the Commission on the dates set forth on Appendix A.

5. Paragon attempted to justify its CPS price through an FCC Form 393 filed on August 1, 1994. Paragon amended its justification on February 1, 1995 in response to a report of the consultants to the Local Franchising Authority.

III. DISCUSSION

6. In its amended benchmark filing of February 1, 1995, Paragon calculated a maximum permitted rate of $3.39 per month (plus franchise fee) for the CPS tier in the communities which are the subject of this Order. Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Paragon's actual monthly charge for its CPS tier was $3.42 (plus franchise fee). Thus, Paragon has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Paragon's showing supports a maximum reasonable CPS tier price of $3.39 per month (plus franchise fee) for the period from the filing of the first complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[11]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Paragon has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Paragon implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Paragon's price for the period after May 14, 1994 may be required to reflect the fact that Paragon's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] This finding is based solely on the representations of Paragon listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

However, we further determine that the total overcharge per subscriber is such a *de minimis* amount that it would not serve the public interest to order a refund.

8. We further conclude that Paragon must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Paragon's price during the earlier period was unreasonable.[12] We reserve the right to make further adjustments to Paragon's price for the period after May 14, 1994 upon completion of our review of Paragon's FCC Form 1200 rate filing.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by Paragon Cable in Gardena, California, CUID No. CA0934; Torrence, California, CUID No. CA0941; and Hawthorne,California, CUID No. CA1022, and all other complaints in these franchise areas relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED that the benchmark filing submitted by Paragon Cable with respect to Gardena, California, CUID No. CA0934; Torrence, California, CUID No. CA0941; and Hawthorne, California, CUID No. CA1022, for the period from the filing of the first valid complaint in each franchise area (as shown in Appendix A) to May 14, 1994, justifies a maximum price of $3.39 per month (plus franchise fee) for the cable programming service tier.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that Paragon Cable shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Gardena, California, CUID No. CA0934; Torrence, California, CUID No. CA0941; and Hawthorne, California, CUID No. CA1022, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

12. IT IS FURTHER ORDERED that Paragon Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0934	11/16/93	11/11/93
0941	10/26/93	10/20/93
1022	2/28/94	2/28/94

[12] We reviewed Paragon's FCC Form 1200 rate filing and confirmed that Paragon calculated its rate for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Multimedia Cablevision, Inc. CUID No. OK0202

Order Dismissing Complaints

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1995; Released: March 20, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Multimedia Cablevision, Inc. ("Multimedia") was charging for its cable programming service ("CPS") tier in Bixby, Oklahoma. *See* Appendix for a list of the number of basic and CPS channels Multimedia offered in Bixby, Oklahoma both before and after September 1, 1993. Rather than attempting to justify its price through a benchmark or cost of service showing, Multimedia responded to the complaints by stating that it has no CPS tier in that system. On March 3, 1995, Multimedia submitted information supporting its claim that CPS tiers subject to rate regulation did not exist as of September 1, 1993 and still do not exist in Bixby, Oklahoma in response to a letter from the Commission staff.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. BACKGROUND

4. The Cable Services Bureau has addressed the regulatory status of packages of channels offered on an a la carte basis in several orders resolving letters of inquiry ("LOIs") directed to cable operators. Of particular relevance to this case, the Cable Services Bureau has released orders resolving LOIs regarding Century Cable TV's ("Century") systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[11] Relying on the Commission's *Going Forward Order*,[12] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings did not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

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[1] Letter from Zenji Nakazawa, FCC, to David P. Fleming, Vice President and General Counsel, Multimedia Cablevision, Inc. (February 7, 1995).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358, 10 FCC Rcd 115 (Cab. Serv. Bur. 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354, 10 FCC Rcd 99 (Cab. Serv. Bur. 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361, 10 FCC Rcd 127 (Cab. Serv. Bur. 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360, 10 FCC Rcd 123 (Cab. Serv. Bur. 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur., released Dec. 12, 1994).

[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

5. Since the LOI orders found that the elimination of Century's CPS tiers did not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as new product tiers, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[13]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Multimedia for Bixby, Oklahoma indicate that Multimedia restructured its service offerings in Bixby, Oklahoma on September 1, 1993 in essentially the same way that Century did for the seven areas mentioned above where LOI orders have been issued. Multimedia discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for six channels which it offered on an a la carte basis.[14] All of the channels in the a la carte package were previously offered either on Multimedia's basic service tier or its cable programming services tier.

7. We feel that we have sufficient information regarding Multimedia's restructured offerings in Bixby, Oklahoma to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Multimedia's CPS tier, the small number of channels that were offered in the a la carte package did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Multimedia to treat its a la carte package in Bixby, Oklahoma as a new product tier even though it would not qualify as a new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Multimedia in Bixby, Oklahoma because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Multimedia's new product tier violates any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[15]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte package created by Multimedia Cablevision, Inc. in Bixby Oklahoma may be treated as a new product tier under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Multimedia Cablevision, Inc. in Bixby, Oklahoma are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur., released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur., released Dec. 20, 1994).

[14] Multimedia offered a six-channel a la carte package consisting of Home Sports Entertainment (HSE), WGN, Cable News Network (CNN), Headline News, Turner Network Television (TNT), and Turner Broadcast Systems (TBS).

[15] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	8/31/93 *Pre-Regulation* Tiers	9/1/93 *Post Regulation* Basic	9/1/93 *Post Regulation* Tiers	9/1/93 *Post Regulation* A la Carte
OK0202	Bixby	9	22	26	0	6

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kauai CableVision, L.P. (dba Kauai CableVision of Hawaii)	CUID Nos. HI0042 (Princeville-Hanalei), HI0044 (Kekaha), HI0045 (Waimea), HI0046 (Hanapepe), HI0047 (Eleele), HI0048 (Kalaheo), HI0049 (Lawai), HI0050 (Omao), HI0051 (Koloa), HI0052 (Wailua Homesteads), HI0053 (Anahola), HI0054 (Kilauea), HI0055 (Hanalei), HI0076 (Haena), HI0077 (Wainiha), HI0094 (Kaumanaki), HI0095 (Makaweli), HI0098 (Barking Sands)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1995; Released: March 20, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Kauai CableVision, L.P. (dba Kauai CableVision of Hawaii) ("Kauai CableVision") was charging for its cable programming service ("CPS") tier in the communities referenced above. Kauai CableVision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. On March 13, 1995, Kauai CableVision submitted supplemental information in response to a letter from the Commission staff.[1] This Order addresses the reasonableness of Kauai CableVision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. Kauai CableVision asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Kauai CableVision's CPS tier price exceeding the maximum permitted price.[12]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Kauai CableVision, L.P. in the communities referenced above, ARE DENIED TO THE EXTENT INDICATED HEREIN.

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[1] Letter from Zenji Nakazawa, FCC, to Barbara J. Wood, Director of Regulatory Affairs, Kauai CableVision, L.P. (March 13, 1995).

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 4, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Harron Communications Corp. CUID No. NY0613
Oriskany, New York

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 20, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Harron Communications Corp. ("Harron") was charging for cable programming service ("CPS") in Oriskany, New York, CUID No. NY0613. Harron has chosen to attempt to justify its price through a benchmark showing on FCC Form 393.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review a cable operator's prices for its cable programming service ("CPS") tier upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

4. The only complaint against Harron's CPS rate in Oriskany, New York, CUID No. NY0613, was filed on March 17, 1994, and states that it was filed to object to a rate increase for the CPS tier offered by Harron.[10] Under the Commission's rules, a complaint regarding a rate change for the CPS tier may be filed within 45 days from the date the complainant first receives a bill reflecting the rate change.[11] However, according to the complaint, the complainant first received a bill reflecting the rate change on January 5, 1994. Therefore, the filing of the complaint on March 17, 1994 was not timely and the complaint must be dismissed.

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint filed March 17,1994 against the cable programming service charge of Harron Communications Corp. in Oriskany, New York, CUID No. NY0613 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Bureau Chief
Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] *Id.*

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[8] *Id.*

[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[10] This complaint was returned by the Commission pursuant to 47 C.F.R. §76.954(b) and subsequently timely refiled under 47 C.F.R. § 76.955. Under these circumstances, the timeliness of the complaint is determined by the date of the initial filing.

[11] 47 C.F.R. § 76.953(b). Complaints about rates in effect on September 1, 1993 must be filed by February 28, 1994. 47 C.F.R. § 76.953(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

ORDER

Adopted: February 28, 1995; Released: March 1, 1995

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), the Commission appoints the Honorable Reed E. Hundt to serve as Chairman of the Federal-State Joint Board in this proceeding. The Commission also appoints the Honorable Susan Ness to serve on this Federal-State Joint Board. These appointments fill positions recently vacated by the Honorable James H. Quello and the Honorable Ervin S. Duggan, respectively. The Honorable Stephen O. Hewlett of the Tennessee Public Service Commission is also appointed to this Federal-State Joint Board to fill the position previously held by the Honorable Lilo Schifter of the Maryland Public Service Commission.[1]

2. Henceforth a copy of all filings in this proceeding shall be served on the appointees at the following addresses:

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M. Street, N.W. - Room 814
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M. Street, N.W. - Room 832
Washington, D.C. 20054

The Honorable Stephen O. Hewlett, Commissioner
Tennessee Public Service Commission
460 James Robertson Parkway.
Nashville, Tennessee 37243-0505

3. The Commission gratefully acknowledges the contributions of the departing members to the work of the Federal-State Joint Board, and remembers with gratitude the dedicated efforts of the late Dennis J. Nagel of the Iowa Utilities Board, who served on this Joint Board since his appointment in 1990.

4. ACCORDINGLY, IT IS ORDERED, that the Honorable Reed E. Hundt, the Honorable Susan Ness, and the Honorable Stephen O. Hewlett, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), are appointed to, and the Honorable Reed E. Hundt shall serve as Chairman of, the Federal-State Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] *See* Letter from Paul Rodgers, General Counsel, NARUC, to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission (November 4, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-281

In the Matter of

Rules and Policies Regarding
Calling Number Identification
Service -- Caller ID

ORDER

Adopted: March 17, 1995; Released: March 17, 1995

By the Commission:

1. In the process of reviewing petitions for reconsideration of the Commission's Rules governing passage of Calling Party Number (CPN) on interstate telephone calls, we have decided on our own motion that the public interest would best be served by temporarily staying effectiveness of Sections 64.1601 and 64.1603 of the Commission's Rules.[1] Interested parties have persuasively argued that no matter how the issues raised in the petition for reconsideration are resolved, and even if the Commission adheres to its original decision in every material respect, compliance will not be possible by April 12, 1995, the effective date specified in the March 29, 1994 *Report and Order and Further Notice of Proposed Rulemaking*.[2]

2. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) of the Communications Act, 47 U.S.C. §§ 1 and 154(i), that effectiveness of Sections 64.1601 and 64.1603 of the Commission's Rules IS STAYED until further notice.

3. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] 47 C.F.R. §§ 64.101 and 64.103.
[2] *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, 9 FCC Rcd. 1764 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ANSWER IOWA File No. I-T-D-95-001

Application for authority to
close public coast station KFT290,
Davenport, Iowa.

ORDER AND AUTHORIZATION

Adopted: April 7, 1995; Released: April 18, 1995

By the Chief, Telecommunications Division:

1. The above-captioned application, filed on December 22, 1994 by Answer Iowa, requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from public coast station KFT290, Davenport, Iowa. The station provides marine service to commercial as well as recreational vehicles operating on the Mississippi River. The application was placed on public notice on January 17, 1995. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of his application, Answer Iowa states that traffic via the station has declined significantly in the recent past. In the past six months, only 87 calls were handled. Adequate service is available in the area via cellular communications and other advanced technologies. Further, the U.S. Coast Guard maintains safety and distress communications services throughout the entire coverage area of applicant's site.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via public coast station KFT290.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-95-001 IS GRANTED, and Answer Iowa is authorized to discontinue service via public coast station KFT290.

6. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.114 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF PUERTO RICO, INC.
AT&T OF THE VIRGIN ISLANDS, INC.

Application for authority to acquire and operate facilities in the COLUMBUS-II, AMERICAS-1, Taino-Carib and UNISUR Cable Systems. File No. I-T-C-95-124

ORDER AND AUTHORIZATION

Adopted: April 7, 1995; Released: April 18, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-124 IS GRANTED, and:

a. AT&T Puerto Rico, Inc. (AT&T-PR) is authorized to acquire from AT&T Corp. on an Indefeasible Right of User (IRU) basis and operate for provision of its regularly authorized services facilities in the COLUMBUS-II Cable System, as follows:

SEGMENT	NO. OF HALF-MIUS[1]	JOINT SERVICE WITH
B	2	TELEGLOBE CANADA
C1/C3/C4	3	TELECOM ITALIA
C1/C2	3	TELEFONICA DE ESPANA
C1/C3/C5	1	FRANCE TELECOM

b. AT&T-PR is authorized to acquire from AT&T Corp. on an IRU basis and operate for provision of its regularly authorized services facilities in the UNISUR Cable System, as follows:

SEGMENT	NO. OF HALF-MIUS	JOINT SERVICE WITH
A/B	1	TELECOMMUNICATIONS INTERNATIONAL OF ARGENTINA

c. AT&T-PR is authorized to acquire from AT&T Corp. on an IRU basis for provision of its regularly authorized services facilities in the AMERICAS-1 Cable System, as follows:

SEGMENT	NO. OF HALF-MIUS	JOINT SERVICE WITH
N	353	AT&T
S1/S2	2	TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO, LTD.
S1/S4	2	EMPRESA BRASILEIRA DE TELECOMUNICACOES
S1/S4	1	TELECOMMUNICATIONS INTERNATIONAL OF ARGENTINA

d. AT&T-PR is authorized to acquire from AT&T Corp. on an IRU basis for provision of its regularly authorized services facilities in the Taino-Carib Cable System, as follows:

SEGMENT	NO. OF HALF-MIUS	JOINT SERVICE WITH
E1/E3	3	TELEFONICA DE ESPANA
E1/E3	3	TELECOM ITALIA
E1/E3	8	C&W NETWORK SERVICES OF BERMUDA
E1/E3	2	TELEGLOBE CANADA
E1/E3	2	BARBADOS EXTERNAL TELECOMMUNICATIONS
E1/E3	2	EMPRESA BRASILEIRA DE TELECOMUNICACOES
E1/E3	1	TELECOMMUNICATIONS INTERNATIONAL OF ARGENTINA
E1/E3	343	AT&T
E1/E3	2	TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO
E1/E3	16	AT&T VIRGIN ISLANDS
E4	2	BARBADOS EXTERNAL TELECOMMUNICATIONS
E4	8	C&W NETWORK SERVICES OF BERMUDA
E4	1	FRANCE TELECOM

[1] A MIU is designated as the Minimum Unit of Investment in the cable systems herein. It is equivalent to 30 MAUOs, each of which is a 64-kbps circuit equivalent.

e. AT&T of the Virgin Islands, Inc. (AT&T-VI) is authorized to acquire from AT&T Corp. on an IRU basis for provision of its regularly authorized services facilities in the AMERICAS-1 Cable System as follows:

SEGMENT	NO. OF HALF-MIUS	JOINT SERVICE WITH
N	67	AT&T

f. AT&T-VI is authorized to acquire from AT&T Corp. on an IRU basis for provision of its regularly authorized services facilities in the Taino-Carib Cable System, as follows:

SEGMENT	NO. OF HALF-MIUS	JOINT SERVICE WITH
E1/E3	16	AT&T-PR
E1/E3	192	AT&T-VI
E4	2	C&W NETWORK SERVICES OF BERMUDA

g. AT&T-PR and AT&T-VI are authorized to acquire by lease, or other comparable means, and operate any necessary overseas connecting facilities.

h. AT&T-VI and AT&T-PR are authorized to activate capacity in the COLUMBUS-II AMERICAS-1, Taino-Carib and UNISUR Cable Systems, and in the aforementioned extension facilities, for the provision of their authorized services between Puerto Rico, the U.S. Virgin Islands, the United States, the British Virgin Islands, Spain, Italy, Brazil, Trinidad, Tortola, Argentina, France, Barbados, Canada, Curacao, Dominica, Montserrat, St. Marten, St. Kitts, St. Lucia and Antigua.

3. IT IS FURTHER ORDERED that AT&T-PR is authorized to establish direct service between Puerto Rico and Argentina for all its authorized services.

4. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MAs for the cable systems in which authority is granted herein, as well as any Commission Order granting authority to acquire and operate facilities in any of those cable systems.

5. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-46

In the Matter of

Amendment of Section 73.202(b), RM-8594
Table of Allotments,
FM Broadcast Stations.
(Edenton, Columbia and Pine Knoll)
Shores, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 7, 1995; Released: April 18, 1995

Comment Date: June 12, 1995
Reply Comment Date: June 27, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Lawrence F. and Margaret A. Loesch ("petitioners") requesting the substitution of Channel 273C1 for Channel 273C2 at Edenton, North Carolina, the reallotment of Channel 273C1 to Columbia, North Carolina, as the community's second local FM service, and the modification of Station WERX-FM's license to specify Columbia as the station's community of license. To accommodate the allotment of Channel 273C1 to Columbia, petitioners also request the substitution of Channel 290A for unoccupied but applied for Channel 272A at Pine Knoll Shores, North Carolina. Petitioners state that they will apply for the channel, if allotted to Columbia.

2. Petitioners contend that their proposal would serve the public interest since it could enable Station WERX-FM to provide 60 dBu service to an additional 28,299 persons, thus providing radio service to 120,177 persons instead of its present 91,878 persons. Columbia, the seat of Tyrrell County, has a 1990 U.S. Census population of 836 persons. It presently receives local transmission service from Station WRSF(FM) on Channel 289C1. Edenton, with a 1990 U.S. Census population of 5,268 persons, would continue to receive local transmission service from Station WBXB(FM), Channel 261C2 and daytime-only AM Station WZBO.

3. Based on the information before us, we are unable to determine whether petitioners' proposal would result in a preferential arrangement of allotments. Petitioners' proposal would not provide a first local transmission service but rather a second such service. Further, while both communities are incorporated and are their respective county's seat, Edenton is substantially larger than Columbia (5,268 persons vs. 836 persons). Thus, the deletion of Channel 273C2 from Edenton would leave the larger community with only one nighttime service. While at this time we do not dispute petitioners' claim that the change of community would enable Station WERX-FM to increase the population it serves by approximately 28,000 persons, we must take into account the fact that an existing service will be deleted from a community. With respect to evaluating proposals to change a station's community of license, the Commission has stated:

> "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to other."

See Community of License MO&O, 5 FCC Rcd at 7097 (1990). Since we are concerned with the loss of transmission service to Edenton, we request that petitioners submit any additional information as to the overall public interest benefits that would be advanced from the grant of this proposal. In addition, we request that the petitioners provide information showing the areas and populations which will receive new service and the areas and population which will lose existing service if Channel 273C1 is reallotted to Columbia. The study should also indicate the number of reception services which are now available with the gain and loss areas.

Technical Summary

4. Channel 273C1 can be allotted to Columbia in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.7 kilometers (15.3 miles) south-southeast to avoid short-spacings to Stations WOLC, Channel 273B, Princess, MD and WHLQ, Channel 273A, Louisburg, NC. Channel 290A can be allotted to Pine Knoll Shores at the transmitter site specified in the pending application of WMBL, Inc. (BPH-920720MA).[1]

5. In light of the above, we shall propose to modify Station WERX-FM's license to specify Channel 273C1 as its operating channel and Columbia as its community of license. In accordance with Section 1.420(g) and (i) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioners demonstrate the availability of an additional equivalent channel at Columbia for use by such parties. We will send a copy of this *Notice of Proposed Rule Making* to WMBL, Inc., the applicant for Channel 272A at Pine Knoll Shores. If Channel 290A is ultimately substituted for Channel 272A at Pine Knoll Shores, the applicant will be permitted to amend its application without loss of cut-off protection. However, because it is only an applicant at this time, it is not entitled to any reimbursement.

[1] The coordinates for Channel 273C1 at Columbia are 35-42-48 North Latitude and 76-08-34 West Longitude. The coordinates for Channel 290A at Pine Knoll Shores are 34-42-38 North Latitude and 76-37-52 West Longitude.

6. We believe the public interest would be served by seeking comments on the proposed substitution of Channel 273C1 for Channel 273C2 at Edenton, North Carolina, its reallotment to Columbia, North Carolina, and the modification of Station WERX's license accordingly. Therefore, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Columbia, North Carolina	289C1	289C1, 273C1
Edenton, North Carolina	261C2, 273C2	261C2
Pine Knoll Shores, North Carolina	272A	290A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 12, 1995**, and reply comments on or before **June 27, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Brooks, Pierce, McLendon,
Humphrey & Leonard, L.L.P.
P.O. Box 1800
209 Fayetteville Street Mall
Raleigh, North Carolina 27602
(Counsel to petitioner).

9. IT IS ORDERED, That the Secretary SHALL SEND, BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to the applicant for Channel 272A at Pine Knoll Shores, NC, as follows: WMBL, Inc., 4217 Woodberry Street, University Park, MD 20782.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:
North Platte Television, Inc. CSR-4025-A
Omaha, Nebraska

For Modification of Station
KNOP-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1995; Released: April 18, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, North Platte Television, Inc., licensee of television station KNOP (hereinafter "KNOP"), North Platte, Nebraska (NBC - channel 2), has requested the Commission to include the Nebraska communities of Cozad, Gothenburg, and Lexington within the North Platte, Nebraska "area of dominant influence" ("ADI") for the purpose of obtaining signal carriage "rights on the cable systems serving those communities."[1] This petition is unopposed.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its Report and Order in MM Docket No. 92-259,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
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> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] TCI Cablevision of Nebraska serves the community of Lexington and Cable USA serves the communities of Gothenburg and Cozad.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e. g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* non-cable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and non-cable homes, and significantly viewed surveys typically measure viewing only in non-cable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, KNOP asks the Commission to add Cozad, Gothenburg, and Lexington, Nebraska to the North Platte, Nebraska ADI so that KNOP may assert must carry rights on the cable systems serving those communities. KNOP explains that the three communities are located in Dawson County which is currently assigned to the Lincoln-Hastings-Kearney ADI. Petitioner argues that the modification should be granted because of relative proximity of the communities to North Platte, roughly 35 miles, and that KNOP is the only NBC signal receivable off-the-air in the communities and carried on their cable systems.

9. In support of its request, KNOP states that it has been carried on the cable system serving Lexington for the last 26 years and the cable systems serving Cozad and Gothenburg for approximately the last ten years. With respect to coverage and local service, KNOP states that its Grade B signal encompasses all of the communities in question. In addition, KNOP is listed as significantly viewed in Dawson County. KNOP states that an analysis of the station's programming during the period beginning May 1991 through July 1993 shows that it has aired some 632 news or sporting events of particular interest to residents in Lexington and a similar analysis reflects some 613 broadcasts treating matters of local interest to the communities of Cozad and Gothenburg. The station gives several examples of coverage of the communities at issue including high school sporting events and local political happenings. As for local viewing patterns, according to 1993 Nielsen figures, KNOP has a net weekly circulation of 50 and a share of 15 in Dawson County. KNOP adds that, on the other hand, the NBC affiliate in Hastings, Nebraska (KHAS) has "achieved minimal reported viewing in Dawson County.

ANALYSIS AND DECISION

10. KNOP has provided sufficient evidence to justify its market modification request and it will accordingly be granted. Turning to the factors specified in the 1992 Cable Act, we find that KNOP has met three of the four statutory

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id.* and n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

elements with the historical carriage requirement and viewership showing being particularly notable. As KNOP's pleading reveals, the station has been continuously carried on the Lexington cable system since 1967 and on the other relevant cable systems for at least ten years. The fact that the cable operators have continuously carried KNOP demonstrates that the cable operators and their subscribers value the station which has been the only NBC network affiliate providing service to the communities at issue.

11. The viewing pattern data in cable and non-cable households also demonstrates that KNOP has a strong marketplace presence in Cozad, Gothenburg, and Lexington. The station has a substantial net weekly circulation (cume) and share in cable and non-cable households in Dawson County. In 1993, for example, KNOP's viewing share in Dawson County was 15 and its net weekly circulation was 50.[11] With respect to coverage and local service to the cable communities, we believe that KNOP has shown that it provides programs of interest to the three communities including coverage of local political activities along with sports and other community-specific human interest stories. Finally, KNOP has shown that it places a Grade B contour over the three communities.[12]

12. With respect to the third factor, we note that KNOP fails to indicate if any other station licensed to communities within the Lincoln-Hastings-Kearney, Nebraska ADI provides coverage of, and programming to, the communities in question. We do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. We view KNOP's showing on each of the other factors is sufficient, and even absent enhancement under the third criterion, grant of its request is warranted.

ORDER

13. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed on August 6, 1993 by North Platte Television, Inc. IS GRANTED.

14. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[12] The Commission has held that Grade B coverage demonstrates service. *See* 8 FCC Rcd at 2981.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

PIKES PEAK BROADCASTING COMPANY
Grand Junction, Colorado

CSR-3819-A

For Modification of Station
KJCT-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1995; Released: April 18, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On April 22, 1993, Pikes Peak Broadcasting Company ["KJCT-TV"], licensee of Station KJCT-TV (ABC, Channel 8), Grand Junction, Colorado, filed a petition for special relief that seeks to include within the Grand Junction-Durango, Colorado "area of dominant influence" the communities of Carbondale, Glenwood Springs, New Castle, Parachute, Rifle, and Silt, Colorado, as well as certain surrounding unincorporated areas of Garfield County, Colorado. KJCT-TV's petition is unopposed.[1]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h)(1)(C) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
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> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
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> (II) whether the television station provides coverage or other local service to such community;
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> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
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> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] KJCT-TV's petition initially sought also to include communities in Montezuma County, Colorado, within the Grand Junction-Durango, Colorado ADI. This portion of KJCT-TV's petition was opposed by Pulitzer Broadcasting Company, licensee of Station KOAT-TV (ABC, Channel 7), Albuquerque, New Mexico. On May 21, 1993, KJCT-TV modified its petition, withdrawing its Montezuma County request, and thus rendering moot the opposition.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

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> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities here in question are all in Garfield County, Colorado, which is assigned by Arbitron to the Denver, Colorado ADI. The Grand Junction-Durango, Colorado ADI borders Garfield County to the south. The communities are located between Grand Junction and Denver.

9. In support of its petition, KJCT-TV notes that its Grade B contour covers most of Garfield County, and that the station conducts outreach to and also supports area civic and community groups and public service organizations. KJCT-TV further notes that Garfield County is immediately adjacent to Mesa County, in which the station's city of license is located, and that the station was granted significantly viewed status in Garfield County by the Commission in 1991, citing *Pikes Peak Broadcasting Co. (KJCT-TV)*, Cable Television Actions Report No. 3372, Mimeo No. 21281 (released January 3, 1992). KJCT-TV submits a list of news stories it aired from January 1, 1992 to April 14, 1993 concerning issues and events affecting Garfield County, and notes that the station's sports coverage "includes sports and highlights from prep-school teams including Rifle, Glenwood Springs, and Basalt," and that the station provides weather forecasts and information for Rifle/Glenwood three times daily. KJCT-TV also states that its city of license, Grand Junction, is only 74.2 miles from Glenwood Springs, and the major population center of Garfield County, while Denver is 125.4 miles from Glenwood Springs.

ANALYSIS AND DECISION

10. The inclusion of the communities in question within the market area of KJCT-TV for purposes of the cable television broadcast mandatory signal carriage rules is, considering all of the circumstances presented, consistent with the purposes specified in §614(h)(1)(C), and its petition will accordingly be granted. KJCT-TV is licensed to Grand Junction, Colorado within the Rocky Mountain area to the west of Denver on the far side of the continental divide. Television reception patterns in the Grand Junction and

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id. and* n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

Denver ADI areas reflect the mountainous terrain, the relatively sparse population within the region, and the widespread use of translators, cable, and satellite stations to improve station coverage. Grand Junction is only 74.2 miles from Glenwood Springs, which is the major population center of Garfield County, while Denver, the core population area of the Denver ADI, is 125.4 miles from Glenwood Springs. KJCT-TV, based on contour prediction calculations, is shown to place a Grade B contour over most of Garfield County whereas the stations licensed in Denver, whose signals are more distant and are generally oriented in a easterly direction, do not.

11. Denver stations, since they are more numerous and are widely circulated in the area, receive the preponderance of the audience in the County (cable and non-cable),[11] but KJCT-TV has been shown to be accessible to viewers in the area in its significantly viewed filing,[12] and, based on the audience survey data, does receive some cable carriage in the area. For a network station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at lease 3 percent (total week hours) and a net weekly circulation of at least 25 percent.[13] KJCT-TV's share in Garfield County was found to be 22%, and its net weekly circulation was 26%, based on county-wide data from 1981-1982. Although the growth of competition in the intervening period has reduced its share, KJCT-TV more recently has achieved a share of 3% and a net weekly circulation of 24% in Garfield County.[14] Although these data do not reflect high levels of viewing, they do, when the difficult terrain in the area is taken into account, reflect KJCT-TV's association with this portion of the market and the difficult competitive situation it faces.

12. KJCT-TV's submissions show that, on average, it covers a Garfield County news story every three days, in addition to local sports and weather information. KJCT-TV has submitted testimonials from civic, community, and government groups from throughout its service area attesting to the value of its service in general and to the existence of some programming specifically directed to Garfield County. This evidence demonstrates that KJCT-TV has a local presence in the communities at issue and provides service to them.

13. The portion of the Cable Act allowing for modification of ADIs "is intended to permit the modification of a station's market to reflect its individual situation."[15] In this case, taking into account the totality of the circumstances involved, including in particular the market and viewing patterns associated with the rugged terrain in this area, we conclude that given KJCT-TV's "individual situation," inclusion of the communities in question is consistent with "value of localism" and will better effectuate the purposes of the carriage rules.

ORDER

14. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief (CSR-3819-A) filed April 22, 1993, by Pikes Peak Broadcasting Company IS GRANTED. This change shall be effective in accordance with the following schedule: Pikes Peak Broadcasting Company shall notify the cable systems in question in writing of its carriage and channel position election (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of the above notice.

15. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] The non-Denver stations licensed to the Denver ADI are not shown as having audience within Garfield County.

[12] *Pikes Peak Broadcasting Co., supra.*

[13] 47 U.S.C. §76.5(i).

[14] Viewership data cited herein is from Arbitron, *Television County Coverage: Colorado*, 1993-1994. This data is county data, rather than community-specific data. However, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we accept such data as probative, although not conclusive, in cases of this type. Early (1991) data showed KJCT-TV with a share of 4% and a net weekly circulation of 11% in noncable homes in Garfield County. In cable households, KJCT-TV's share was 1% and its net weekly circulation 23%. Arbitron, *Television County Coverage: Colorado* (Cable Controlled Counties), 1991.

[15] *MM Docket 92-259*, 8 FCC Rcd at 2977.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

WOWT-TV CSR-3966-A
Omaha, Nebraska

For Modification of its
Cable Must-Carry Television Market

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 18, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, Chronicle Publishing Company, licensee of television station WOWT (hereinafter "WOWT"), Omaha, Nebraska (NBC - Channel 6), has requested the Commission to include Lancaster County within the Omaha, Nebraska "area of dominant influence" ("ADI") for the purpose of obtaining signal carriage rights on the cable system serving that County. Television station KHGI (ABC - Channel 13), Kearney, Nebraska, filed an opposition to the petition for special relief as did television station KHAS (NBC - Channel 5), Hastings, Nebraska. WOWT filed separate replies in response to oppositions of KHAS and KHGI.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[4] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[5]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* non-cable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and non-cable homes, and significantly viewed surveys typically measure viewing only in non-cable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[6]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[7] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[8]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[9] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, WOWT asks the Commission to add Lancaster County, Nebraska to the Omaha, Nebraska ADI so that WOWT may assert must carry rights on Lincoln Cablevision, the cable system which essentially serves the entire county. WOWT asks that Lancaster County, not specific communities, be included in the Omaha ADI. WOWT states that the 1992 Cable Act permits the Commission to add "communities" to a local television market where doing so would "better effectuate the purposes" of the Act's must-carry provision. WOWT notes that neither the statute nor the Commission's rules define the term "community." WOWT argues that, in this instance, it makes essentially no difference as to whether the "community" at issue is defined as Lancaster County, Lincoln or the homes served by Lincoln Cablevision. To support its argument, WOWT maintains that over 85% of the television households in Lancaster County are located in Lincoln, and over 95% of the households in the entire county are passed by Lincoln Cablevision.

9. To justify its request, WOWT states that it has been carried on Lincoln Cablevision continuously since cable service was established in 1969. WOWT adds that it is the only NBC network affiliate currently carried on the cable system which serves nearly 70,000 subscribers in Lancaster County.[10] With respect to coverage and local service, WOWT states that its Grade B signal encompasses virtually all of Lancaster County and its Grade A signal includes a portion of Lancaster County. WOWT notes that it meets the local programming needs of Lancaster County in a variety of ways, including news coverage and community affairs announcements, as well as general public affairs programming.[11] In addition, WOWT airs about 30 news stories a month concerning events and happenings in the County and maintains a full-time news bureau in Lincoln. As for local viewing patterns, WOWT maintains that it has substantial viewership in Lancaster County with viewing

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[5] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[6] 8 FCC Rcd at 2977 (emphasis in original).
[7] *Id. and* n.139.
[8] 47 C.F.R. §76.59.
[9] 8 FCC Rcd at 2981.
[10] On October 7, 1993, WOWT submitted a statement of support for its market modification from Mike Johanns, the mayor of Lincoln, Nebraska.
[11] WOWT also states that it supports community projects in Lancaster County such as the Lincoln national multiple sclerosis supercities walk. WOWT's programming and community efforts are documented in an appendix attached to its petition for special relief.

data showing that its local news programs consistently ranked among the top three local news programs in the market. According to WOWT, it received a 15 share for prime-time, a 9 share for day-time and a 5 share for the early evening news in Lancaster County in 1992.

10. KHAS argues in opposition that the grant of WOWT's petition would unsettle marketplace balances between the Omaha television market and the Lincoln-Hastings-Kearney television market. KHAS explains that it is an NBC affiliate licensed to Hastings, Nebraska, which is part of the Lincoln-Hastings-Kearney ADI and it therefore is entitled to mandatory carriage rights throughout the Lincoln ADI including Lancaster County. KHAS asserts that granting WOWT must carry rights on Lancaster County cable systems may displace carriage of KHAS and other Lincoln ADI television stations. It also states that enforcement of mandatory cable carriage for WOWT throughout Lancaster County "ultimately will allow cable systems to forego carriage of NBC affiliate KHAS-TV in favor of the more proximate NBC affiliate, WOWT, pursuant to Section 76.56(b)(5) of the Commission's rules." As for the specific market modification criteria, KHAS claims that WOWT fails to show that no other television station provides coverage of issues of concern to Lancaster County residents. With regard to WOWT's request to include Lancaster County in its entirety in the Omaha ADI, KHAS responds that the relief WOWT requests "is well beyond the scope of what the Commission is authorized to grant" under the 1992 Cable Act and the Commission's rules." Finally, KHAS remarks that nothing in the 1992 Cable Act prevents Lancaster County cable systems from carrying WOWT in addition to television stations already entitled to must carry status; if WOWT's programming service is as critical to the County's viewer's as WOWT claims it is, local cable systems will choose to carry the signal based on subscriber demand.

11. WOWT asserts in its reply that KHAS does not demonstrate sufficient grounds for denying its petition. WOWT first maintains that KHAS, which is more than 120 miles from Lincoln in Lancaster County, places no viewable signal over any part of Lancaster County, has never been carried on any cable system in Lancaster County, has no viewers in Lancaster County, and provides no evidence of any effort to program for the residents of Lancaster County. As for the substance of the opposition, WOWT argues that KHAS claim of marketplace "disruptions" is "absurd" because it is WOWT, not KHAS, which seeks to maintain the existing pattern of cable carriage; in this matter, it is KHAS which seeks to disrupt existing cable carriage and viewing patterns by, at some unspecified point in the future, relaying its distant signal to Lincoln Cablevision's headend, and demanding carriage. WOWT counters the arguments raised by KHAS that its petition should be denied because it failed to show that no other television station provides coverage of issues of concern to residents of Lancaster County. WOWT asserts that while KHAS claims that other stations in the market like KOLN and KOUN provide such coverage, the opposition fails to provide any specifics as to the particular stories or programs carried by these stations. More importantly, WOWT argues, KHAS does not state that it provides such coverage. Finally, WOWT rebuts KHAS's argument that the 1992 Cable Act only authorizes the Commission to add communities and not counties. WOWT reiterates that neither the 1992 Cable Act nor the Commission's rules define the term "community" and regardless of how the Commission chooses to define that term, the petition demonstrates that WOWT is local to all of Lancaster County.

12. KHGI argues in opposition that WOWT has failed to demonstrate that no other area television stations serve or will soon serve the subject communities.[12] KHGI notes that WOWT ignores the fact that KOLN already provides substantial public affairs programming and news of local interest to Lincoln viewers. KHGI adds that it has a permit to construct a translator in Lincoln which will soon deliver its programming to that city[13] and that the station plans on maintaining a news bureau in Lincoln to better cover local events.

13. In its reply to KHGI, WOWT argues that the opposition is frivolous and should be rejected for the same reasons as the opposition of KHAS. In addition, WOWT states that KHGI does not meet the goals of localism because its signal is not carried on any Lancaster County cable system and it lacks viewership in Lancaster County. In contrast, WOWT has a history of carriage on Lincoln Cablevision, places a strong signal over all of Lancaster County, and has maintained strong viewer ratings throughout the County.

ANALYSIS AND DECISION

14. WOWT has provided sufficient evidence to justify its market modification request and it will accordingly be granted. However, we limit the modification to those communities served by Lincoln Cablevision because that is the only cable system that WOWT noted in its petition and to which we can apply the requisite statutory criteria. The 1992 Cable Act authorizes the Commission to modify ADI's to eliminate or include "communities." We do not read the word "community" as it is used in Section 614(h), in its legislative history,[14] or as used in cable regulation generally to mean "county." To allow stations or cable operators to seek to include or exclude entire counties from a particular ADI without regard to the individual circumstances of the communities or franchised areas within such counties would not facilitate an evaluation of the specific modification criteria provided for in the Act and thus an identification of the specific communities within the county has generally been required.[15]

15. Turning to the factors specified in the 1992 Cable Act, we find that WOWT has met all four statutory elements with the historical carriage requirement and viewership showing being particularly notable. As WOWT's pleading states, the station has been continuously carried

[12] KHGI states that it only opposes WOWT's petition to the extent that the arguments may be used by the Commission as a basis to modify KETV's market to include Lincoln. We note that we recently granted KETV's market modification petition. *See Pulitzer Publishing Co.*, DA 95-600 (released March 31, 1995).

[13] According to KHGI, it requested carriage on Lincoln Cablevision but was rejected because of the station's poor signal quality as received at the system's principal headend. With the addition of a translator, KHGI hopes to provide the operator with a city-grade signal.

[14] *See* H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).

[15] We recently denied a cable operator's plea to exclude a station from particular markets partly because it asked that entire counties be removed from an ADI. *See Tele-Media Corporation*, DA 94-1574 (released: January 5, 1995).

on Lincoln Cablevision since 1969. The fact that the cable operator has continuously carried WOWT for over 25 years demonstrates that Lincoln Cablevision and its subscribers value the station which has been the only NBC network affiliate providing service to the communities at issue.

16. The viewing pattern data in cable and non-cable households also demonstrates that WOWT has a strong marketplace presence in Lancaster County. The station has a 74 net weekly circulation in cable and non-cable households in Lancaster County.[16] Its viewing share in Lancaster County is 12.[17] Additionally, WOWT is the only NBC affiliate serving Lancaster County and found on Lincoln Cablevision. With respect to coverage and local service to the cable communities, we believe that WOWT has shown that it provides Lincoln Cablevision subscribers with locally oriented programming including coverage of state and local political news along with sports and other community-specific human interest stories. A detailed programming log provided by WOWT supports this conclusion. WOWT's submission of a testimonial from Lincoln's mayor is also persuasive as to the station's service to the cable communities. Finally, WOWT has shown that it places a Grade B contour or better over Lancaster County.[18]

17. WOWT also makes a successful showing under the third statutory factor. We find it persuasive that WOWT is the only station providing NBC programming to residents of Lancaster County and found on Lincoln Cablevision. In contrast, and as noted by WOWT, KHAS, the NBC affiliate licensed to Hastings, places no viewable signal over any part of Lancaster County, has never been carried on any cable system in Lancaster County, has no viewers in Lancaster County, and provides no evidence of any effort to program for the residents of Lancaster County. These facts enhance WOWT's argument for market modification.

18. We note that according to WOWT, KHAS plans on relaying its distant signal to Lincoln Cablevision. We also note that KHGI states it has a translator in Lincoln so that it will place a good quality signal over Lincoln.[19] We believe that one of the principal considerations underlying the ADI waiver process is to insure that historic viewing patterns are not disrupted. Consequently, we believe that KHGI's construction, or KHAS's future construction, of a translator station is not relevant to our waiver analysis.

ORDER

19. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed July 7, 1993 by Chronicle Publishing Company IS GRANTED with respect to the communities served by Lincoln Cablevision in Lancaster County and otherwise IS DENIED.

20. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[16] *See* Arbitron's Television County Coverage for 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[17] *See id.*

[18] The Commission has held that Grade B coverage demonstrates service. *See* 8 FCC Rcd at 2981.

[19] Counsel for KHGI confirms this fact.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

North Central Cable Communications, Inc. dba Meredith Cable — CSR-3930-A

For Modification of Television Broadcast Station KXLI's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1995; Released: April 18, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, North Central Cable Communications, Inc. dba Meredith Cable ("Meredith"), has requested the Commission to modify the Minneapolis-St. Paul, Minnesota Area of Dominant Influence (ADI) relative to Television Broadcast Station KXLI (Ind., Ch. 41), St. Cloud, Minnesota. Specifically, Meredith requests that the communities served by six of its Minneapolis, Minnesota cable systems[1] be excluded from KXLI's ADI, for the purpose of the cable television mandatory broadcast signal carriage rules. An opposition to this petition was filed by KX Acquisition L.P., licensee of KXLI, to which Meredith replied.[2]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][3] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[4] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI area. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;

---

[1] The six cable systems and their respective communities are as follows:

1) Columbia Heights system -- serving Columbia Heights and Hilltop, Minnesota.

2) Eagan system -- serving Burnsville and Eagan, Minnesota.

3) Quad Cities system -- serving Anoka, Champlin, Ramsey and Andover, Minnesota.

4) Ramsey/Washington system -- serving White Bear Lake, White Bear Township, Pine Springs, Grant, Willernie, Vadnais Heights, Birchwood Village, Mahtomedi, Dellwood, Hugo, Oakdale, Maplewood, North St. Paul, Lake Elmo, Gem Lake, and Landfall, Minnesota.

5) North Suburbs system -- serving Shoreview, North Oaks, New Brighton, Arden Hills, Mounds View, Roseville, Lauderdale, Little Canada, Falcon Heights and St. Anthony, Minnesota.

6) North Central Suburbs -- serving Lino Lakes, Centerville, Circle Pines, Lexington, Ham Lake, Blaine, Spring Lake Park, Coon Rapids and Oak Grove, Minnesota.

[2] A resolution in support of Meredith's petition was filed October 12, 1993, on behalf of the Member Cities of the North Central Suburban Cable Communications Commission [NCSCCC], urging grant of the petition. KXLI filed a Motion to Strike this resolution on November 3, 1993, arguing that the resolution was late-filed, and that NCSCCC has not demonstrated its standing in this proceeding. NCSCCC's submission is late-filed, and adds nothing of substance to this proceeding. In light of this, we grant KXLI's motion.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[6] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[7]

4. The legislative history of this provision indicates that:

> The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[8]

5. The Commission provided guidance in *MM Docket No. 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[9]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[10] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[11]

MODIFICATION ARGUMENTS

7. The communities here in question are located in the counties of Anoka, Dakota, Hennepin, Ramsey and Washington, Minnesota, all of which are located within the Minneapolis-St. Paul, Minnesota ADI. St. Cloud, Minnesota, KXLI's city of license, is considered to be a part of the same ADI and is approximately 40 miles from the nearest of the communities served by Meredith.

8. In support of its petition, Meredith argues that KXLI should be excluded from carriage on its systems for several reasons. First, KXLI is not currently being carried on any of the systems and has not been carried since it went dark in 1988.[12] As a result, maintains Meredith, removing KXLI would cause no disruption to established viewing patterns nor would it deprive KXLI of an existing cable audience. Second, KXLI fails to provide adequate local programming or services of interest to the communities in question. Indeed, Meredith states, the other local must carry stations, which have been historically carried on its systems, provide a more than adequate amount of local programming. Third, Meredith already carries another home shopping station so that KXLI's programming would make little contribution to the needs of Meredith's subscribers. Fourth, although KXLI has been deemed to be significantly viewed in the counties in which its communities are located, Meredith argues that this is irrelevant since this status was obtained before the station went dark and had a dramatic format change.[13] Moreover, a significantly-viewed designation based only on noncable homes offers no legitimate evidence that a station's carriage is warranted.

9. In its opposition, KXLI states that it was historically carried on Meredith's systems from 1982 until it was forced off-the-air by financial difficulties in 1988. In addition, both its Grade A and Grade B contours cover the instant communities and its main studio/transmitter is located only 21 miles from Meredith's principal headend in Anoka, Minnesota. KXLI points out that it supplements its home shopping format with a variety of locally-originated issue-responsive, public service, religious, and children's programming. It maintains that Meredith provides no evidence (*i.e.,* program logs, *etc.)* to support its contention that the

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[7] 47 U.S.C. §534(h)(1)(C)(ii). As Congress recognized, "[t]hese factors are not intended to be exclusive . . . ." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[8] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

[9] *MM Docket 92-259,* 8 FCC Rcd at 2977.

[10] *MM Docket 92-259,* 8 FCC Rcd at 2977, 2977 n.139.

[11] 47 C.F.R. §76.59.

[12] KXLI originally went on the air November 24, 1982 operating as a traditional UHF independent station. It went dark December 15, 1988, and resumed transmitting on September 29, 1990 with programming from the Home Shopping Network.

[13] Meredith states in its petition that KXLI indicates that it is reverting back to a traditional independent station on or before October 1, 1993. It argues that KXLI's previous significantly-viewed status should also hold no weight to such future format changes.

other must-carry stations it carries already provide adequate local programming. Moreover, KXLI avers that Meredith's claim that the station's significantly-viewed status is no longer valid is without precedent. The Commission has never required periodic audience surveys to retain such status, despite format changes. In any event, KXLI states that the number of home shopping purchases it receives from viewers in the Minneapolis area proves that its viewership is far greater than a normal 2% share. Indeed, it states that despite not being carried by any cable system in the Twin Cities area since 1990, it still serves an impressive number of noncable viewers. In seven months, it points out, it had 6,885 buyers, or approximately 6% of the noncable viewers. KXLI maintains that this is a conservative estimate since the number of viewers who watch home shopping programming without making a purchase is substantially larger. Further, KXLI argues that Meredith completely ignores the Commission's decision according home shopping stations must-carry rights and concluded that home shopping stations have the same obligation as other stations to provide local programming.[14] Also, despite Meredith's assertions, KXLI maintains that its carriage, in addition to the two nonbroadcast home shopping services already carried by Meredith,[15] would enhance the competition choices of subscribers. *Report and Order, supra,* at paragraph 22.

10. Meredith's reply does not dispute the fact that home shopping stations were given must-carry status by Commission order. Instead it argues that of the local programming KXLI claims it provides to the communities at issue, only two programs afford a nominal showing of "localism" and both should be afforded little weight in meeting this requirement.[16] Finally, Meredith maintains the issue of its addition of another nonbroadcast home shopping station is irrelevant to the question of whether or not KXLI meets the must-carry requirements.

DISCUSSION

11. Because Meredith has not pointed to particularized and persuasive evidence that the communities in question are not part of KXLI's market, based on the four specific statutory or any other relevant factors, its petition must be denied. Initially we note that, given the general structure of the market, including the fact that St. Cloud, KXLI's city of license, is in the approximate center of the market, its inclusion not only within the ADI of the market, but within the same standard metropolitan statistical area, the Grade A signal coverage by KXLI of the core of the market, and the high degree of overlap between the service area of KXLI and all of the other stations licensed to Minneapolis-St. Paul, it appears at the outset that KXLI is logically part of this ADI as are the cable communities in question. Moreover, from the evidence, there appears to be current interest in the Minneapolis area not only for KXLI's home shopping programming, but also for the locally-originated programming that KXLI is providing in its weekly schedule.

12. With regard to the first statutory criterion, which deals with historic carriage on a cable system, we note that the 1992 Cable Act was adopted in part to cure past discriminatory signal carriage practices.[17] Where, as is the case here, a petitioner seeks to delete a station from a relevant ADI with respect to a cable system and cable carriage patterns do not help to differentiate between communities in the area or in the market, we believe that failure to establish continual historic carriage should not be given great weight. KXLI was carried on Meredith's systems from 1982 when it first went on the air until it was forced off-the-air by financial difficulties in 1988. The fact that Meredith chose not to reestablish KXLI's carriage when it resumed programming in 1990 does not lessen KXLI's must-carry rights in its own ADI market. Second, both KXLI's Grade A and Grade B contours encompass the communities in question. Also, Meredith has not questioned KXLI's signal quality. The fact that other ADI licensees provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

13. Further, we also find Meredith's arguments regarding KXLI's lack of ratings to be unpersuasive. First, the Commission has previously recognized that stations that could once be classified as specialty stations (*i.e.*, religious and foreign language), are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[18] We continue to believe, that the fact that such stations attract limited audiences must be taken into account in determining the equities concerning such stations' rights to cable carriage. Home shopping stations, which also have limited audiences for like reasons, warrant analogous treatment and consideration. KXLI has submitted evidence that over a seven-month period it received a large number of home shopping purchases from viewers in the relevant counties totalling approximately 6% of all of the non-cable viewers in Meredith's service areas. This is significant considering that the cable viewership in the relevant counties ranges from 41% to 51%.[19] It could be assumed, therefore, that access to cable viewers would only increase KXLI's showing. Consequently, based upon the above, we find that Meredith has failed to carry its burden

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[14] *Report and Order in MM Docket 93-8,* 8 FCC Rcd 5321 (1993).

[15] KXLI states that Meredith originally carried QVC and then, on July 1, 1993, after KXLI filed its petition and despite its assertions that it did not need another home shopping station, added HSN, another nonbroadcast home shopping channel. In addition, KXLI points out that both of these stations compete directly with KXLI's home shopping programming without providing any public interest programming.

[16] Meredith cites "Minnesota Shop-In", a show promoting leisure activities broadcast five times a week as having only 37 participants from its cable communities and a weekly rebroadcast of a 90-minute non-denominational church service.

[17] *See, e.g., Act III Broadcasting of Nashville, Inc.,* 8 FCC Rcd 8544, 8546 (1993).

[18] *First Report and Order in Docket 20553,* 58 FCC 2d 442, 452 (1976), *recon. denied,* 60 FCC 2d 661 (1976). *See also Montgomery Cablevision, L.P. dba Cable TV Montgomery,* DA 95-400 (released March 9, 1995).

[19] *Cf. Montgomery Cablevision, L.P. dba Cable TV Montgomery,* DA 95-400 (released March 9, 1995)(area in question as significant donorship source).

of establishing that the public interest would be served by deleting KXLI from the Minneapolis-St. Paul ADI as it relates to carriage on Meredith's cable systems at issue.

ORDER

14. Accordingly, IT IS ORDERED, pursuant to §614(C) of the Communications Act of 1934, as amended (47 U.S.C. 534) and §76.59 of the Commission's Rules (47 CFR §76.59), That the captioned petition for special relief, filed June 30, 1993, by North Central Cable Communications, Inc. dba Meredith Cable IS DENIED. Its petitions having been denied, North Central Cable Communications, Inc. dba Meredith Cable shall comply with the applicable provisions of the Section 614 of the Communications Act and the associated rules within sixty (60) days of the release of this Order.

15. This action is taken pursuant to authority delegated under §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amherst Telephone Company

Request for Extension of
Waiver of the Commission's
Equal Access Implementation
Plan for Independent
Telephone Companies

ORDER

Adopted: April 4, 1995; Released: April 19, 1995

By the Chief, Policy and Program Planning Division:

1. In an Order released May 27, 1992, the Chief, Common Carrier Bureau, granted Amherst Telephone Company (Amherst) a waiver of the Commission's equal access implementation requirements for its Amherst, Polonia, and Rosholt exchanges.[1] As a result, Amherst was scheduled to complete equal access conversion by January 1, 1995. On December 21, 1994, Amherst filed a request with the Commission seeking an extension of the initial waiver for the Amherst, Polonia, and Rosholt exchanges.[2] In this order, we grant Amherst's request for an extension of the Commission's equal access implementation requirements until April 19, 1995.

2. In the *ITC Equal Access Order,* the Commission required independent telephone companies (ITCs) to convert end offices equipped with stored-program-controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an interexchange carrier.[3] The Commission provided, however, that ITCs may seek a waiver of this requirement if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[4]

3. In this order, we consider Amherst's request for an extension of the waiver granted for the Amherst, Polonia, and Rosholt exchanges. Amherst states that it engaged in technical discussions with various manufacturers in February and March of 1994 in order to begin service by late Fall, 1994. Due to a challenge to the bids by one of the manufacturers, the Rural Electrification Administration requested additional information which Amherst states caused a delay of selection approval of the manufacturer until September 20, 1994. Amherst states that this delay prevented Amherst's equipment manufacturer from meeting the Commission's January 1, 1995 deadline. Amherst states that it is now installing and testing the host/remote configuration within its equal access conversion timeline.

4. Amherst requests an extension of the waiver because the schedule is in place for the three exchanges to be converted on April 19, 1995. Amherst adds that the interested interexchange carriers have been advised of the new date, and they have neither expressed objections to Amherst's equal access timetable nor filed comments in response to the Commission's Public Notice.[5]

5. Based on our review of the record, we conclude that Amherst has set forth circumstances justifying its request, and that the extension is in the public interest. Amherst's request was put on public notice, and no comments were filed. Amherst has proceeded in a reasonable fashion to convert the Amherst, Polonia, and Rosholt exchanges to equal access. The interested carriers have not opposed Amherst's proposed new completion date for equal access conversion. Thus, we grant Amherst's request for an extension, until April 19, 1995, to complete the equal access conversion for the Amherst, Polonia, and Rosholt exchanges.

6. Accordingly, IT IS ORDERED that Amherst's request to extend the waiver of the equal access implementation requirements for Amherst, Polonia, and Rosholt is GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program Planning Division
Common Carrier Bureau

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[1] In the Matter of Amherst Telephone Company and Woodhull Community Telephone Company, Requests for Waiver of the Commission's Equal Access Implementation Plan for Independent Telephone Companies, 7 FCC Rcd 3210 (Com. Car. Bur. 1992).

[2] FCC Public Notice, DA 95-9, Pleading Cycle Established for Comments on Amherst Telephone Company's Request for Extension of Equal Access Implementation Waiver, released January 5, 1995.

[3] *MTS and WATS Market Structure,* CC Docket No. 78-72, Phase III Order, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[4] *Id.,* 100 FCC 2d at 875, para. 50.

[5] Amherst Reply Comments at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-68

In the Matter of

Amendment of Section 73.202(b), RM-8486
Table of Allotments,
FM Broadcast Stations.
(Billings, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 12, 1995; Released: April 19, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 3150 (1994), proposing the allotment of Channel 286A to Billings, Montana, as that community's seventh FM broadcast service.[1] The *Notice* was issued in response to a petition filed by Bruce L. Erickson ("Erickson"). Erickson filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. PBMI Limited Partnership ("PBMI") filed comments and an Erratum.[2] Erickson filed reply comments.

2. PBMI, licensee of Station KGHL(AM) and KIDX(FM), Billings, Montana, opposes the allotment of Channel 286A at Billings. PBMI argues that Billings is located in a market with sufficient existing facilities and that the Commission should not allot another FM channel to the community. PBMI points out that in addition to the channels licensed to the community, Billings is also served by Station KBWJ(FM), Hardin, Montana, and KTWM(FM), Laurel, Montana. There are three television stations in Billings and also a CATV system. According to PBMI, Billings with a population of 80,800 simply cannot sustain another FM station. However, in the event the Commission decides to allot an additional FM channel to Billings, PBMI will apply for the channel when it is allotted and, if its application is granted, will construct and operate the station.

3. Erickson, in his reply comments, argues that an additional channel in Billings will compete with PBMI's stations in the Billings' market. Hence PBMI's opposition to the requested allotment. Erickson contends that the ability of Channel 286A to compete in the market and the economic impact of the new station on the public is both unfounded and irrelevant. Erickson states that he is prepared to assume the risks of operating an additional station in Billings. Erickson further states that PBMI has failed to establish any valid grounds for denial of the proposed allotment. The proposal complies with the Commission's technical rules and he has reaffirmed his interest in the allotment. Erickson requests that the Commission promptly allot Channel 286A to Billings, Montana.

4. We believe the public interest would be served by the allotment of Channel 286A at Billings, Montana, since it will provide additional service to the community. An engineering analysis has determined that Channel 286A can be allotted to Billings in compliance with the Commission's spacing requirements without a site restriction.[3] PBMI's concerns that the additional allotment of Channel 286A at Billings will increase competition raises issues which the Commission has already determined are not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989). Consequently, there is no basis under the current state of Commission precedent for consideration of these issues. In any event, the existence of two valid expressions of interest for a new allotment at Billings, including one by the party who is questioning the viability of the new allotment, would appear to indicate that there is a sufficient basis for making the allotment.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Billings, Montana	277C1, 231C, 246C2, 253C1, 275C1, 279C1, 286A

6. The window period for filing applications for Channel 286A at Billings will open on **June 5, 1995**, and close on **July 6, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

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[1] Stations KYYA (Channel 227C1), KRKX (Channel 231C), KKBR Channel 246C2), KIDX (Channel 253C1), KCTR (Channel 275C1) and KOHZ (Channel 279C1) are licensed to Billings. Station KEMC, Channel *219C1, is also licensed to Billings.

[2] PBMI filed an Erratum to its comments. Therein, PBMI withdrew its comments questioning the ability of Bruce Erickson, President of American Bank and current licensee of Station KBMJ(FM), Hardin, Montana, to petition for an additional channel in Billings. PBMI has been informed that petitioner is not the same Bruce Erickson that is President of American Bank and licensee of Station KBMJ(FM).

[3] The coordinates for Channel 286A at Billings are 45-46-58 and 108-30-13.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-142

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Knoxville, Illinois) — RM-8546

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 12, 1995; Released: April 19, 1995

By the Chief, Allocations Branch:

1. Pursuant to the request of John Pritchard ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 7287 (1994), proposing the allotment of Channel 287A to Knoxville, Illinois, as that community's first local aural transmission service. Petitioner filed comments restating his intention to apply for Channel 287A, if allotted.

2. We believe the public interest would be served by allotting Channel 287A to Knoxville, Illinois, since it could provide a first local aural service to that community. As indicated in the *Notice*, Channel 287A can be allotted to Knoxville in compliance with the Commission's minimum distance separation requirements without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections (4i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Knoxville, Illinois	287A

4. The window period for filing applications will open on **June 5, 1995**, and close on **July 6, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 287A at Knoxville are North Latitude 40-54-30 and West Longitude 90-16-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 19, 1995

AMERITECH OPERATING COMPANIES FILE PETITION FOR WAIVER IN AFFILIATE TRANSACTIONS

PUBLIC COMMENT INVITED

On March 30, 1995, the Ameritech Operating Companies ("Ameritech") filed a petition for waiver of Section 32.27(d) of the Commission's Rules. Ameritech is requesting this waiver to permit Ameritech Publishing, Inc. ("API"), their directory affiliate, to provide service to Ameritech without charge. Such transactions are identified in Ameritech's cost allocation manual as "no charge" items. Ameritech claims that since no charge items benefit ratepayers by enabling Ameritech to obtain services from API without paying for them, the waiver is in the public interest and consistent with Commission directives.

Interested parties may file comments on the petition for waiver no later than **May 15, 1995**. Replies should be filed by **May 30, 1995**. Comments should reference file number AAD 95-60. A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service ("ITS"), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information, contact Ed Dashkin at (202) 418-0806.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 19, 1995

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

Several local exchange carriers filed revisions to their Cost Allocation Manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended March 31, 1995. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Alltel Telephone Company	AAD 95-40
Ameritech Operating Companies	AAD 95-42
Bell Atlantic	AAD 95-43
BellSouth Corporation	AAD 95-44
Citizens Utilities Company	AAD 95-46
GTE	AAD 95-47
Lincoln Telephone	AAD 95-48
Nevada Bell	AAD 95-49
NYNEX Telephone Companies	AAD 95-50
Pacific Bell	AAD 95-51
Puerto Rico Telephone Company	AAD 95-52
Rochester Telephone	AAD 95-53
Southwestern Bell	AAD 95-55
United & Central	AAD 95-56
U S West, Inc.	AAD 95-57

The following companies filed letters stating there were no changes to their CAMs for the quarter ended March 31, 1995.

American Telephone & Telegraph Company	AAD 95-41
Cincinnati Bell Telephone Company	AAD 95-45
Southern New England Telephone Company	AAD 95-54
National Exchange Carrier Association	AAD 95-58

Parties may file comments on the proposed revisions to the CAMs no later than **May 8, 1995.** Replies should be filed by **May 23, 1995.** Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M Street, N.W. Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Sherice Reams at (202) 418-0810.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-95-030

Application for authority to acquire and operate facilities for service between the United States and various overseas points.

ERRATUM

Released: April 20, 1995

By the Chief, Telecommunications Division:

1. On March 28, 1995, the Commission released an Order and Authorization in the above-captioned matter (DA 95-574). Paragraph 2.a. is corrected to read:

> "a. lease from Comsat and operate the voice-grade satellite circuits listed in Appendix A, between MCI's authorized U.S. international earth stations and appropriate INTELSAT satellites over the Atlantic and Pacific Oceans, connecting with similar circuits between the satellite and earth stations in the countries listed in Appendix A, furnished by MCI's correspondents;"

2. Appendix A is corrected by adding the following countries to the list of countries to be served via INTELSAT:

COUNTRY	NUMBER OF 64 KBPS CIRCUITS
CZECH REPUBLIC	90
SLOVENIA	60

3. Appendix B is corrected by adding the following country to the list of countries to be served via cable:

COUNTRY	NUMBER OF 64 KBPS CIRCUITS	FACILITIES
NEPAL	30	TAT-11 IOR SATELLITE

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COLUMBIA LONG DISTANCE SERVICES, INC. File No. I-T-C-95-157

For Authority Pursuant to
Section 214 of the
of the Communications Act,
as amended, to provide
International Communications
Services between the
United States and North Korea

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 11, 1995; Released: April 20, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-95-157 IS GRANTED, and Columbia Long Distance Services, Inc. (CLDS) is authorized to:

a. lease from Columbia/TDRSS International Satellite System and operate up to ten 64-Kbps equivalent circuits for service not interconnected with the public switched network between appropriately licensed earth stations (including earth stations on Guam and other U.S. possessions, and territories in the Pacific Ocean region) and the TDRS-174 Satellite, connecting with similar circuits between the satellite and the Democratic Peoples Republic of Korea (North Korea), furnished by its correspondent;

b. lease from Columbia/TDRSS International Satellite System and operate up to six 64-Kbps equivalent circuits for service that is interconnected with the public switched network between appropriately licensed earth stations (including earth stations on Guam and other U.S. possessions, and territories in the Pacific Ocean region) and the TDRS-174 Satellite, connecting with similar circuits between the satellite and North Korea, furnished by its correspondent;

c. lease and operate necessary connecting facilities in the United States;

d. lease a one-half interest in and operate any necessary overseas connecting facilities; and

e. use the facilities authorized herein to provide international switched voice, private line, video, facsimile and data services, including services interconnected with the public switched network, between the United States and North Korea.

3. IT IS FURTHER ORDERED that neither CLDS nor any persons or companies directly or indirectly controlling or controlled by CLDS, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CLDS or any persons or companies controlling or controlled by CLDS are parties.

4. IT IS FURTHER ORDERED that our authorization of CLDS to provide private lines as a part of its authorized services is limited to the provision of such private lines only between the United States and North Korea -- that is, private lines which originate in the United States and terminate in North Korea or which originate in North Korea and terminate in the United States. In addition, CLDS may not -- and CLDS' tariff must state that CLDS' customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that North Korea affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51. Copies of any operating agreements shall also be filed with the U.S. Department of State and the U.S. Department of the Treasury.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the Columbia/TDRSS satellites.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applica-

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Harron Communications Corp. CUID No. PA1849
East Whiteland, Pennsylvania

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Harron Communications Corp. ("Harron") was charging for its cable programming service ("CPS") tier in East Whiteland, Pennsylvania, CUID No. PA1849. Harron has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Harron's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in East Whiteland Township, CUID No. PA1849, was completed and served on Harron on October 12, 1993 and received by the Commission on October 15, 1993.

5. Harron filed an FCC Form 393 for East Whiteland Township, CUID No. PA1849 on November 15, 1993. Harron amended its justification on February 17, 1995, in response to a Commission letter which requested further clarification of Harron's showing.[11] Harron submitted additional information on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. Harron asserts that its monthly CPS tier price is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.78, as calculated in the filing. Upon review of Harron's Form 393 filing, we have found that Harron has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Harron's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Harron did not report any income tax expense. Harron is a Subchapter C corpora-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Harron has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Harron implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Harron's price for the period after May 14, 1994 may be required to reflect the fact that Harron's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letter from Peter G. Wolfe, FCC, to Gardner F. Gillespie, Esq., Counsel for Harron (Feb. 14, 1995).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994) (*"Public Notice"*); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

tion and is therefore required to pay corporate income tax.[13] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore calculate Harron's federal income tax allowance on Column G of Schedules A and C on the basis of a 35% corporate tax rate.[14] Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[15] In accordance with this principle, we recalculate Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 53.85% of Harron's return on investment.

b. In its Form 393 filing of February 7, 1995, Harron incorrectly calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127; and Form 393, Part II, Worksheet 4, Line 401). Lines 122 and 125 of Form 393 require the operator to enter Gross National Product Price Index ("GNP-PI") data for the latest quarter for which data is available that ended before the date through which the Inflation Adjustment Factor is calculated. On its most recent Form 393, Harron calculated the Inflation Adjustment Factor through October 1993. However, Harron completed Lines 122 and 125 using updated GNP-PI data for the first quarter of 1993, rather than the third quarter of 1993. Harron's calculation of the Inflation Adjustment Factor is therefore incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Harron filed.[16] On its most recent Form 393, Harron entered 13 months on Line 124, indicating that its filing was as of the end of October 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993.

7. Because of these errors, we conclude that Harron has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price from $10.78 to $10.58.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Harron's showing supports the maximum reasonable CPS tier price of $10.58 (plus franchise fee) for the period from October 15, 1993 to May 14, 1994.[17] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Harron must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Harron's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Harron's price for the period after May 14, 1994, upon completion of our review of Harron's FCC Form 1200 rate filings.

10. We further conclude that Harron has submitted in good faith a timely optional supplemental filing in response to our *Public Notice*. As provided in the *Public Notice*, we will relieve Harron of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint filed October 15, 1993 against the cable programming service price charged by Harron Communications Corp. in the Township of East Whiteland, Pennsylvania, CUID No. PA1849, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Harron Communications Corp. with respect to the Township of East Whiteland, Pennsylvania, CUID No. PA1849, for the period beginning on October 15, 1993 and ending on May 14, 1994 justifies the maximum price of $10.58 (plus franchise fee) per month for Harron Communications Corp.'s cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Harron Communications Corp. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from October 15, 1993[18] to May 14, 1994 which exceeded $10.58 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Harron Communications Corp. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within

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[13] *See* Harron's filing on FCC Form 1205, page 1, filed August 15, 1994.

[14] *Id.*

[15] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[16] See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of Harron listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Harron Communications Corp. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the Township of East Whiteland, Pennsylvania, CUID No. PA1849, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $10.58 (plus franchise fee).

16. IT IS FURTHER ORDERED that Harron Communications Corp. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Harron Communications Corp. shall not be required to obtain advance approval of adjustments to its CPS price in East Whiteland Township, Pennsylvania, CUID No. PA1849, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable Portland, Multnomah County, and Linnton Oregon	CUID Nos. OR0241, OR0305, OR0306, OR0307, OR0308, OR0334, OR0366

Benchmark Filings to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 20, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the prices Paragon Cable ("Paragon") was charging for its cable programming service ("CPS") tier in the Oregon communities designated by the CUID numbers referenced above. Paragon has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Paragon's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393. [9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Paragon filed motions to dismiss several of the complaints in the communities which are the subject of this Order, including the complaints of the Consolidated Cable Communications Commission in all of the communities which are the subject of this Order. The Consolidated Cable Communications Commission filed a reply, and Paragon filed a response.

5. Paragon requests that the Commission dismiss each of the complaints as to which it filed a motion to dismiss for one or more of the following reasons. First, Paragon asserts that some complainants either failed to answer question number 8 on FCC Form 329 as it existed prior to January 1994 (requesting the complainant to identify the rate complained about), or incorrectly answered question number 8 because they included rates for service on the basic tier, a la carte services and equipment, as well as for service on the CPS tier. Second, Paragon asserts that some complainants incorrectly answered question number 9 because they included channels that are offered on an a la carte basis. Finally, Paragon states that some complainants attached addenda to the complaints addressing charges other than the CPS tier rate.

6. Paragon's assertions do not persuade us that the first filed complaints in the franchise areas addressed in this Order are invalid or should be dismissed.[11] In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because each complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in response to question number 8 include rates for services in

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Because we are accepting the validity of the first filed complaint in each franchise area, we find it unnecessary to rule on Paragon's objections to the later filed complaints. We also note that Paragon did not move to dismiss the earliest filed complaint in Portland, Oregon, CUID No. OR0241, so we need not address Paragon's objections to any of the complaints in that franchise area.

the CPS tier, we find it reasonable to conclude that the complainants objected to the CPS tier rates and that they believed that those rates were unreasonable.

7. Paragon asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to or below the maximum permitted charges. Upon review, we have found no apparent errors that would require a recalculation of Paragon's maximum permitted CPS prices.[12]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the motions of Paragon Cable to dismiss the earliest filed complaints in Multnomah County, Oregon, CUID Nos. OR0305, OR0306, OR0307, OR0308, and OR0334, and Linnton, Oregon, CUID No. OR0366 ARE DENIED.

9. IT IS FURTHER ORDERED THAT the complaints referenced herein against the cable programming service prices charged by Paragon Cable in Portland, Oregon, CUID No. OR0241; Multnomah County, Oregon, CUID Nos. OR0305, OR0306, OR0307, OR0308, and OR0334; and Linnton, Oregon, CUID No. OR0366 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

[12] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company CUID Nos. MI0029
Sault Ste. Marie, Michigan and MI0136
Calumet, Michigan

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Bresnan Communications Company ("Operator") was charging for its cable programming service ("CPS") tier in Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136. Operator has attempted to justify its prices through separate benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, Operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints were completed and served on Operator on October 13, 1993 for CUID No. MI0029, and on October 8, 1993 for CUID No. MI0136. The Commission received the complaints on October 18, 1993 for MI0029, and on October 8, 1993 for CUID No. MI0136.

5. Operator attempted to justify its CPS prices through separate FCC Forms 393 filed on November 15, 1993 for CUID Nos. MI0029 and MI0136. Operator amended its justifications for CUID Nos. MI0029 and MI0136 on February 7, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[11]

III. DISCUSSION

6. Operator asserts that its monthly CPS tier prices of $12.33 in CUID No. MI0029 and $10.98 in CUID No. MI0136 are justified by its benchmark filings because its prices are less than the maximum permitted charges calculated in the filings. Upon review of Operator's filings, we have found the following errors that require a recalculation of Operator's maximum permitted CPS prices:

a. In Line 3 of Step A of Part III of its FCC Form 393, Operator did not correctly calculate its customer equipment and installation costs using the percentages of total maintenance and installation costs stated

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, a reduction in the operator's prices for the period after May 14, 1994 may be required to reflect the fact that the operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

on Line 2. We therefore adjusted Line 3 to equal the percentages stated on Line 2 of the total costs entered on Line 1, and adjusted subsequent steps accordingly.

b. In Columns A, B, C and D of Worksheet 1 of Part II of its FCC Forms 393, Operator completed information for four separate tiers although its rate cards showed only two tier offerings consisting of basic and CPS programming with related charges. Accordingly, Worksheet 1 was adjusted to reflect only the two tiers and to include tier channels and tier charge information consistent with the rate cards.

c. Operator's Form 393, Worksheet 1, Line 104 entries do not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entries.[12] However, Operator's entries on Line 104 differed substantially from its entries on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34, as adjusted pursuant to paragraph 6a, *supra*.

7. Because of these errors, we conclude that Operator has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[13] On its Forms 393, Operator entered 13 months on Line 124, indicating that it calculated the Inflation Adjustment Factor through October 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates, of 1.030.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier prices from $12.42 and $11.07 per month (as Operator calculated) to $12.17 and $10.56 per month for Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136, respectively.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Operator's showings support maximum reasonable CPS tier prices of $12.17 and $10.56 per month (plus franchise fee) for Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136, respectively, for the period October 18, 1993 to May 14, 1994 for CUID No. MI0029, and for the period October 8, 1993 to May 14, 1994 for CUID No. MI0136.[14] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Operator must reflect in its Form 1200 rate filings for the period after May 14, 1994 the fact that Operator's prices during the earlier period were unreasonable.[15] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's FCC Form 1200 rate filings.

11. We further conclude that Operator has submitted in good faith timely optional supplemental filings in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Operator of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service prices charged by Operator in Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Operator with respect to Sault Ste. Marie, Michigan, CUID No. MI0029, for the period of October 18, 1993 to May 14, 1994; and Calumet, Michigan, CUID No. MI0136, for the period of October 8, 1993 to May 14, 1994, justify maximum prices of $12.17 and $10.56 per month (plus franchise fee) for Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136, respectively, for the cable programming service tier.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers that portion of the amounts paid for cable programming service from October 18, 1993 (in CUID No. MI0029) and October 8, 1993 (in CUID No. MI0136)[17] to May 14, 1994, that exceeded $12.17

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[12] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed Operator's Form 1200 rate filings and confirmed that Operator calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[17] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

and $10.56 per month (plus franchise fee) for Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136, respectively, and was thus unreasonable, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the same periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings for Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for each franchise area (plus franchise fee).

17. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after submission of the revised Form 1200 filings required above, CPS tier prices for Sault Ste. Marie, Michigan, CUID No. MI0029; and Calumet, Michigan, CUID No. MI0136, that reflect the reductions in the CPS rate determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY CABLE
OF SOUTHERN CALIFORNIA

Appeals of Local
Rate Orders of the City of
La Habra, CA and the City of
Brea, CA

CONSOLIDATED ORDER

Adopted: March 17, 1995; Released: March 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. By this Order, we consolidate two related proceedings into one proceeding and rule on the merits raised in each proceeding. Specifically, we resolve the appeals filed by Century Cable of Southern California challenging the local rate orders adopted by the Cities of La Habra and Brea, California. In the interest of administrative efficiency, we have decided that each appeal is sufficiently related to the other to justify the joint resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.

2. On April 28, 1994, Century Cable of Southern California ("Century"), the franchisee in the above matters, filed with the Commission appeals of two local rate orders adopted on March 28, 1994 by two of its local franchising authorities in the City of La Habra and the City of Brea, California (the "Cities"). Century also filed requests for stay of both local rate orders on April 28, 1994. These requests were originally granted on May 17, 1994, pending resolution of Century's appeals.[1] On May 13, 1994, the Cities filed oppositions, urging the Commission to reject Century's appeals and to allow the Cities' rate orders to go into effect unchanged. On May 19, 1994, Century filed a reply to each of the Cities' oppositions. The Cities' rate orders establish new rate schedules for Century's basic service tier and associated equipment and installations and direct Century to issue subscriber refunds.[2]

3. Century challenges the Cities' rate orders on several grounds. First, Century claims that the Cities improperly treated its six-channel a la carte package as a regulated offering. Second, Century argues that the Cities misapplied the Commission's rate regulations by ordering Century to set its rates for addressable converters at their current or actual levels, rather than at their higher, but permitted levels. Third, Century claims that the Cities erred in their review of Century's Form 393 by adjusting Line 204 of Part II in a manner contrary to the Commission's rules. Finally, Century asserts that the Cities failed to comply with the Commission's procedural requirements when they issued their rate orders.

4. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it is determined that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[7]

II. DISCUSSION

A. TREATMENT OF A LA CARTE PACKAGE

5. As part of their decisions setting Century's basic tier rates, the Cities found Century's collective or package offering of six channels (AMC, TNT, Discovery, CNN, TBS and TNN), known as the Century Select package, to be a regulated tier of service.[8] The a la carte package at issue

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[1] *See Century Cable of Southern California*, 9 FCC Rcd 2345, 2347 (1994), *extended*, 9 FCC Rcd 3288, 3289 (1994), *extended*, 9 FCC Rcd 4089, 4090 (1994), *amended* 9 FCC Rcd 7202 (1994).

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[3] *See* 47 C.F.R. § 76.944 (1994).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation & Buy-Through Prohibition, Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Rate Order*, 8 FCC Rcd at 5732; *Third Recon. Order*, 9 FCC Rcd at 4346.

[7] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Recon. Order"*).

[8] Century's a la carte package was identical in both La Habra and Brea.

was first offered to Century's subscribers on September 1, 1993, when Century restructured the service offerings on its La Habra and Brea systems. Century states that its restructuring involved eliminating its 14 channel cable programming services ("CPS") tier and offering six of the channels, TNT, CNN, TBS, TNN, AMC and the Discovery Channel, on an individual basis and also as a package that Century alleges is not subject to rate regulation. Century moved the remaining channels from its CPS tier to its basic tier.

. 6. Century argues that the Cities' decision to treat its a la carte package as a regulated tier of service is contrary to the objectives of the 1992 Cable Act and the Commission's a la carte rules and, therefore, the Cities' adverse ruling on Century's a la carte offering should be overturned. Century argues that its a la carte package complies with the Commission's a la carte rules in effect at the time the package was created[9] and that the Cities' reliance upon the 15 interpretive guidelines announced by the Commission in March 1994 to determine the regulatory status of Century's a la carte channels constituted "retroactive rulemaking."[10] In response, the Cities assert that they properly applied the Commission's guidelines on a la carte packages in treating Century's package as a regulated tier and therefore, that their decisions are reasonable and should be sustained.

7. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Century Cable TV*, Brunswick, Georgia, LOI-93-44, LOI 94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994) (*"Century of Brunswick"*), in which we resolved the regulatory status of an la carte package offered by Century on its Brunswick, Georgia, system that is similar to the a la carte package at issue in these appeals. Specifically, the a la carte package at issue in *Century of Brunswick* was a six channel package, made up of channels formerly available on Century's two CPS tiers, which was offered as part of a restructuring. In that case, we found we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 1226 (1994) (*"Going Forward Order"*).[11]

8. We find that the Cities' determinations that Century's a la carte package is a regulated tier are inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Century of Brunswick*. We further find that, in accordance with *Century of Brunswick*, Century's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the Cities so that they can enter an order consistent with our findings in *Century of Brunswick*.[12]

B. ADDRESSABLE CONVERTERS

9. Century also challenges the Cities' rate orders with respect to the rate that they established for Century's addressable converter boxes. Century alleges that the Cities set its rate for addressable converters at the current rate rather than at the maximum permitted rate as calculated under its Form 393.[13] The Cities respond that even though they ultimately agree that Century's permitted rate for addressable converters should be $1.25 per month, not $0.73 per month, they instead approved the actual rate of $0.73 per month because a contrary result would have violated the Commission's rate regulations and the then-existing "rate freeze" imposed by the Commission.

10. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[14] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that

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[9] *See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 1164, 1184-85 (1993).

[10] In the *Second Recon. Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Recon. Order* at 4214.

[11] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[12] We need not address Century's argument with respect to the "retroactive" application by the State of the 15 guidelines set forth in the *Second Recon. Order*, in light of the fact that we grant Century's appeal on the a la carte issue and remand this case to the Cities.

[13] On the Cover Sheet (Part I) of its Form 393, Century's maximum permitted rate for addressable converters is listed as $1.25 per month, while its current rate is listed as $0.73 per month. The Cities set Century's rates for addressable converters at $0.73 per month.

[14] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Recon. Order*, 9 FCC Rcd at 4183-4185, the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

11. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[15] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figure to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installations are based on actual cost and are calculated in Part III of the Form 393.

12. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installations at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[16] In these appeals, the Cities did not dispute either the validity of the figures used in Century's Form 393 or the accuracy of the calculations in the form. Moreover, they agreed with Century that its maximum permitted rate for addressable converters as determined in its Form 393 should be $1.25 per month. Therefore, the Cities should allow Century to charge its maximum permitted rates, as derived by the Form 393. The Cities are incorrect in stating that allowing an operator to increase a particular rate from its current level to its maximum permitted level would have violated the Commission's rate freeze. In the *Rate Freeze Order*, the Commission ordered that rates of cable services subject to regulation under the 1992 Cable Act be frozen as of April 5, 1993.[17] Under the terms of the Commission's rate freeze, once an operator became rate regulated, the rate freeze no longer applied to that operator.[18] Therefore, we reject this argument.

13. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[19] For instance, in this case, the Cities may not order Century to set its equipment rates for addressable converters below maximum permitted levels. Accordingly, we are remanding this issue to the Cities so that they can reconsider their rulings in a manner consistent with our findings.

C. EQUIPMENT REVENUE ALLOCATION

14. Century argues that the Cities substituted inappropriate and inaccurate data for Century's equipment revenue figure in its entry for Line 204, Worksheet 2, Part II of Form 393. Century claims that the Cities improperly substituted their own data for this portion of the form because they determined that Century had not used revenue amounts from the fiscal year preceding September 30, 1992. Instead, Century had used data from the fiscal year ending May 31, 1993, which was its most recently completed fiscal year prior to the filing of its Form 393. Century claims that the equipment revenue data that it had submitted to the Cities was in accord with the Commission's rules because the Commission clarified in a public notice that this portion of the form required data from ". . . the most recently completed fiscal year prior to the time the operator completes the form."[20] In response, the Cities assert that under their own interpretations of the Commission's guidelines, this portion of the form requires the use of data from an operator's fiscal year that ended before September 30, 1992. Because Century failed to provide this data, the Cities argue that they were required to use the best information available as a substitute.

15. We agree with Century that the Cities improperly rejected the data that Century submitted as its entry for Line 204, Worksheet 2, Part II of Form 393 and incorrectly substituted their own data. As Century correctly notes in its appeals, we have previously stated that this portion of the

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[15] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[16] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[17] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"), clarified*, 8 FCC Rcd 2917, 58 FR 21929 (1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993) (*"Deferral Order"), Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993) (*"November 10 Extension Order"); extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994) (*"February 8 Extension Order"*). Generally, these orders required operators to freeze the average amount of revenues received per subscriber for regulated cable services at the level in effect on April 5, 1993. The freeze was effectuated by requiring that the average monthly subscriber bill for services subject to rate regulation may not increase above the average monthly subscriber bill in effect on April 5, 1993. *Rate Freeze Order*, 8 FCC Rcd at 2921-2922.

[18] *November 10 Extension Order*, 58 FR at 60142-43.

[19] *See Rate Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

[20] *See Public Notice*, "Cable Television Rate Regulation, Questions and Answers Relating to FCC Form 393," Question 12 (released July 30, 1993).

form requires data from the most recently completed fiscal year, not data from the fiscal year prior to September 30, 1992.[21] We find that the Cities were not reasonable in rejecting Century's data and substituting their own data for this entry when Century's data had been submitted in accordance with our rules. Therefore, we are remanding this issue to the Cities so that they can render a decision in accordance with our findings.

D. PROCEDURAL ISSUES

16. Finally, Century claims that the final basic service tier rates approved by the Cities in their rate orders adopted on March 28, 1994 were less than the tentative rates contained in resolutions issued by the Cities on March 24, 1994 at the Cities' final public meetings. Century claims that the lower, final rates are based on substantively inaccurate information, resulting from procedural improprieties by the Cities in issuing their rate orders. Specifically, Century asserts that the Cities' final rate orders incorporate rate calculations that were based on the erroneous assumption that Century provides bulk subscriptions to both its basic service tier and its CPS tier, when, in fact, it provides them only to the basic service tier. Century claims that after the public meetings on March 24, 1994, the Cities solicited further information from Century on March 25, 1994 concerning its total number of bulk subscriptions. Century provided the Cities with a figure representing its bulk subscriptions in equivalent billing units ("EBUs"). Century asserts that the Cities then used this information to set Century's rates by changing the subscriber numbers that Century had provided in its Form 393, resulting in lower basic service tier rates. Century claims that the Cities incorrectly used Century's information to change its CPS tier subscriber numbers when it should only have been used to change its basic service tier numbers. Because Century's bulk subscriptions are only available for the basic service tier, the Cities' miscalculation of its subscriber numbers resulted in unreasonably reduced permitted rates for the basic service tier.[22] Because the Cities did not consult with Century in this final stage of its review and because Century was given no opportunity to comment on the Cities' final decisions, Century claims that the Cities issued rate orders based on inaccurate information.

17. Century also asserts that the Cities never made available to it or the public a copy of their own Form 393s reflecting the calculations on which their rate orders were based. Century contends that a copy of each Cities' Form 393 is essential for it to independently analyze the mathematical bases for the Cities' decisions. Century claims that because the Form 393 is central to benchmark rate regulation, franchising authorities should be required to provide copies of the form for public review.

18. In response, the Cities argue that Century's procedural arguments are merely attempts to confuse the real issues. The Cities argue that Century has not established that the Cities violated any of the Commission's procedural rules or were so unfair so as to deprive Century of due process. The Cities contend that the resolutions adopted by the Cities on March 24, 1994 specifically authorized the City Manager to collect further information from Century and to adjust Century's rates accordingly, within prescribed limits. The Cities assert that Century officials were at their meetings and were aware of this decision to which they did not object. The Cities emphasize that they were both under a fast-approaching deadline, imposed under the Commission's procedural rules, to issue a rate order, based on the best information available, by March 28, 1994.[23] Both of the Cities' last scheduled City Council meetings prior to this deadline were March 24, 1994. The Cities contend that they were forced to balance the need to issue comprehensive rate orders by March 28th with local constraints, such as the scheduling of City Council meetings, that exist independent of those requirements contained in the Commission's rate rules. Therefore, the reasonableness of the Cities' decisions must be judged in this context. Moreover, the Cities assert that Century never indicated that the EBU figure that it provided the Cities to account for its bulk subscriptions was only applicable to its basic service tier. Therefore, it was reasonable for the Cities to assume that the figure applied to both the basic service tier and the CPS tier.

19. The Cities also dispute Century's contention that they were required to publicly provide a copy of the Form 393 upon which they based their rate orders, arguing that the Commission's rules only require a franchising authority to provide a written explanation for its decision. The Cities assert that Century was closely consulted throughout the review process and that it was provided with ample opportunity to review and comment on the Cities' decisions, and, as a result, it received fair and reasonable treatment.

20. We find that there were no procedural irregularities in the Cities' consideration of Century's Form 393. However, because the Cities do not challenge Century's allegation that it has no bulk subscriptions to its CPS tier or that the Cities' use of that figure was incorrect, we find that it was inappropriate for the Cities to set Century's basic service rate operating under the incorrect assumption that Century had bulk subscriptions to its CPS tier. Therefore, we are remanding this matter to the Cities for resolution in accordance with the terms of this Order.

21. With respect to Century's claim that it did not receive a copy of either of the Cities' Form 393 to verify the Cities' calculations, although franchising authorities are required to provide a written explanation for their rate orders, they are not required to provide operators with a copy of a recalculated Form 393.[24] Moreover, in this instance, the Cities provided Century with written decisions as well as copies of many of the documents they relied upon in issuing their decisions, including their consultant reports. It appears from the submissions that each of the Cities and Century have been in close contact throughout

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[21] *See Id.*

[22] Because regulated programming rates determined under the benchmark regime (*e.g.*, Form 393) are based on a "tier-neutral" per-channel rate and because the number of CPS subscribers is one element in determining an operator's permitted per-channel rate, an operator's permitted basic service tier rate can be impacted by a change in its entry for the total number of CPS subscribers in Part II of the form.

[23] In its reply, Century disputes the Cities' argument that they needed to issue a rate order by March 28, 1994. Century claims that the Cities could have issued tolling orders, under the Commission's rules, prior to March 28th to preserve their authority to rule on the reasonableness of Century's rates. By doing so, Century asserts that the Cities could have avoided issuing decisions based on a mistaken assumption.

[24] *See* 47 C.F.R. § 76.936; *Rate Order*, 8 FCC Rcd at 5715.

the rate review process and that the Cities have made extensive efforts to inform Century of their actions. We note that Century was able to present arguments in its appeals addressing very specific and technical aspects of our rules as applied to the Cities' rate orders. Based on all of this, we conclude that Century had enough information to understand the logic and to recognize the factual bases of the Cities' decisions.

III. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that the appeals of local rate orders filed by Century Cable of Southern California, with respect to the issue of the regulatory status of Century's a la carte package, are REMANDED to the City of La Habra and the City of Brea for resolution in accordance with the terms of this Order.

23. IT IS FURTHER ORDERED that Century's appeals with respect to the issue of Century's permitted charges for addressable converters are REMANDED to the City of La Habra and the City of Brea for resolution in accordance with the terms of this Order.

24. IT IS FURTHER ORDERED that Century's appeals with respect to the issue of Century's equipment revenue allocation in Line 204 of Part II of Form 393 are REMANDED to the City of La Habra and the City of Brea for resolution in accordance with the terms of this Order.

25. IT IS FURTHER ORDERED that Century's appeals with respect to the Cities' miscalculation of Century's basic service tier rate are REMANDED to the City of La Habra and the City of Brea for resolution in accordance with the terms of this Order.

26. IT IS FURTHER ORDERED that our stays of the rate orders issued by the City of La Habra and the City of Brea which were granted pending the resolution of this appeal are hereby VACATED.

27. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — AAD 95-32

ORDER TO SHOW CAUSE

Adopted: January 26, 1995; Released: March 3, 1995

By the Commission:

I. INTRODUCTION

1. On May 19, 1994 we released a federal-state joint audit report ("Audit Report") that examined transactions between Southwestern Bell Telephone Company ("SWBT") and various SWBT affiliates, including its parent, Southwestern Bell Corporation ("SBC"), and Southwestern Bell Asset Management, Inc. ("AMI").[1] The audit report found various apparent violations of our rules in the accounting methodologies and practices employed by SWBT to book charges for services provided by affiliates to SWBT.[2] We directed the Common Carrier Bureau to review the report and propose appropriate Commission action. This Order directs SWBT to show cause why we should not find that certain SWBT and affiliate accounting practices, associated with the allocation of costs and recorded charges for affiliate transactions, violate Commission rules. We also order SWBT to show cause why this Commission should not, as a result of said findings, take appropriate enforcement action, including issuing a Notice of Apparent Liability for Forfeiture,[3] and ordering SWBT to bring its accounting practices into conformity with Commission policies and rules governing affiliate transactions and associated cost accounting.

II. BACKGROUND

2. The joint audit of SWBT is one of several joint audits undertaken, or contemplated, with state regulatory commissions that share jurisdiction with the Commission over telecommunications common carriers under the Communications Act of 1934.[4] The SWBT joint audit constitutes a notable first in that all of the jurisdictions that regulate a local exchange carrier's provision of telecommunications services participated. For purposes of the audit, this Commission's cost allocation and affiliate transactions rules were applied. The audit covered calendar years 1989 through 1992, during which period SWBT's affiliates billed it approximately $880 million, while SWBT billed approximately $129 million to the affiliates.[5] When we authorized release of the Audit Report last May, we did so without accepting or affirming any of the report's analyses or conclusions. After reviewing the Audit Report, we conclude that it identified a number of significant anomalies in the accounting methodologies and practices used by SWBT and its affiliates. We find that these anomalies warrant further investigation by the Commission and may well require corrective action.

3. The affiliate transactions rules are part of the Uniform System of Accounts ("USOA") that the Commission promulgated so that carriers will record their costs and revenues in a uniform and systematic manner.[6] Generally, that system requires carriers to record as costs and revenues the actual amounts they pay to, or receive from, their suppliers and customers. Such an approach, however, is inadequate to protect ratepayers when the transactions involve carriers dealing with affiliates rather than third parties. In such instances, we have found that the amounts paid to or received from affiliates for goods and services are not an accurate indication of the transaction's value.[7] The Commission developed its affiliate transactions rules to provide a valuation methodology for transactions where regulated carriers are not dealing at arm's length. These rules have become more important over the past few years as telecommunications carriers have diversified to offer a wide variety of regulated and nonregulated products and services.

4. The affiliate transactions rules were adopted in the *Joint Cost* proceeding, which also promulgated rules governing the apportionment of carriers' costs between regulated services and nonregulated activities.[8] The carriers are required to apply these cost apportionment rules in developing their cost allocation manuals (CAMs) which describe

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[1] *Audit Release Order*, 9 FCC Rcd _____ (1994) (Audit Release Order). Besides this Commission, the members of the joint audit task force included representatives of the telecommunications regulatory commissions of Arkansas, Kansas, Missouri, Oklahoma and Texas. The Joint Audit Report consists of the the auditors' findings ("Audit Report"), a reply to these findings by SWBT ("SWBT Analysis") and the auditors' response to that reply ("Audit Team Reply").

[2] The joint audit was a comprehensive audit of affiliate transactions between SWBT, which provides regulated telecommunications services within its franchise areas, and numerous affiliates. The Audit Report found apparent rule violations or accounting irregularities only in certain cases involving transactions flowing from SBC and AMI to SWBT. The Audit Report further concluded that, in other transactions involving SWBT and Southwestern Bell Technology Resources, Inc. (TRI), Southwestern Bell Telecommunications, Inc. (Telecom) and Southwestern Bell Mobile Systems, Inc. (SBMS), there was no evidence to indicate there had been Commission rule violations or that telephone ratepayers had been adversely affected by the investigated transactions.

[3] *See* 47 C.F.R. § 1.80.

[4] *See* 47 U.S.C. § 152.

[5] Audit Report, at C-5.

[6] *See* 47 C.F.R. § 32.1.

[7] *See* Amendments of Parts 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and their Nonregulated Affiliates, *Notice of Proposed Rulemaking*, 8 FCC Rcd 8071, at 8071-8072 (1993).

[8] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket No. 86-111, 2 FCC Rcd 1298 (Joint Cost Order), recon., 2 FCC Rcd 6283 (1987) (Joint Cost Reconsideration Order), further recon., 3 FCC Rcd 6701 (1988) (Further Reconsideration Order), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

in detail how costs are apportioned to regulated and nonregulated operations. The CAMs also identify each affiliate that engages in transactions with a carrier, and describe the nature, terms and frequency of those transactions.[9]

III. ISSUES INVOLVING SWBT AND SBC

5. SBC is one of seven regional Bell holding companies. SBC and its subsidiaries provide, *inter alia*, telephone service, customer premises equipment (CPE), yellow pages advertising, printing and distribution of telephone directories, wireless communications services, as well as various product management and support services. SBC provides management services for the corporation, including present and future subsidiaries. SBC also pursues new business opportunities and manages corporateinvestments.[10]

6. The Audit Report alleges three apparent violations of the Commission's cost allocation rules associated with SBC's accounting for transactions with SWBT: (1) lack of supporting documentation for time charged by SBC employees; (2) use of an improper marketing allocator; and (3) improper use of the general allocator.

A. Lack of Supporting Documentation for SBC Employee Time Charging

7. The amounts that SWBT records in its USOA accounts for services obtained from SBC are determined by SBC's system for allocating costs between regulated and nonregulated operations. SBC's cost allocation system, in turn, is primarily driven by costs based on time charged by employees. Such costs are allocated between regulated and nonregulated services based on the relative amounts of time an employee spends on different activities that are assigned to regulated and nonregulated operations. Therefore, the accuracy of SBC's cost allocation system depends on whether employees are accurately recording their time spent on regulated and nonregulated activities and on whether SBC's cost assignments accurately reflect work time. The auditors discovered that, for 1989-1992, the factors that SBC used to allocate its costs could not be substantiated by any underlying documentation. For example, neither historical time studies nor any contemporaneous records exist to support SBC's cost allocations to subsidiaries.[11] SWBT asserts that SBC relies on annual and periodic time reviews by employees and supervisors to verify that the employee's time is being spent according to cost categories and percentages which the employee must review at the time the employee reviews his or her time card.[12] SWBT argues that SBC trains its employees to take their time review obligations seriously, and that its periodic reviews render time studies unnecessary. The auditors maintain that, regardless of the specific reporting and review system employed by SBC, they cannot meaningfully audit that system unless there are records such as time studies, or contemporaneous employee work records.[13]

8. SWBT counters that its employee time cards and explanations of its time review procedures , coupled with on-site employee interviews conducted by the auditors, should be sufficient to verify the accuracy of SBC's time charging practices.[14] SWBT further states that, while it does not dispute the auditors' authority to examine the survey time reports SBC used to allocate its employees' time and associated costs between regulated telephone and nonregulated activities, it does challenge the power of the auditors, or this Commission, to impose documentation requirements on nonregulated affiliates without "due process."[15]

9. SBC's argument misses the point; the auditors are not imposing new or unlawful documentation requirements on SBC, but, rather, seeking to evaluate the costs SWBT has entered on its books for its transactions with SBC. Consequently, the auditors properly requested contemporaneous documentation to analyze the work functions SBC had developed for its time reporting system, and documentation to evaluate the accuracy of individual employee time reports. Neither could be provided to the auditors. Moreover, the SBC employees interviewed by the auditors were unable to produce contemporaneous records documenting how they spent their time. In the absence of time studies or contemporaneous records, the auditors could not conclude that SBC employees were reporting their time accurately or that SWBT was complying with our rules in accounting for its transactions with SBC.

10. Our auditing of regulated carriers like SWBT is severely compromised if we cannot evaluate the cost inputs that form the basis of cost allocations to carrier operations. Accordingly, in the *Joint Cost Order*, we specifically imposed on local exchange carrier nonregulated operations those marketing personnel cost documentation requirements we had earlier imposed on AT&T in authorizing that company's nonregulated provision of customer premises equipment (CPE) and enhanced services.[16] When the

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[9] 47 C.F.R. § 64.903(a). *See Affiliate Transactions Notice*, 8 FCC Rcd 8071, at para. 7. Only AT&T and those local exchange carriers (LECs) having annual revenues of $100 million or more are required to file CAMs.

[10] Audit Report, at D-14.

[11] Time studies provide a record of an employee's actual work-time spent within a defined period. The results are used to identify the work categories and the percentages of work time spent within those categories that will be the basis for allocating employee costs.

[12] According to verbal information provided by SWBT to Commission staff, besides annual employee/supervisor review, the employee is instructed to review his or her semi-monthly time card and is directed to consult with the appropriate supervisor if actual time spent is at variance with the cost categories and percentages. According to SWBT, the time cards also provide for exception time reporting where the employee spends time on other projects not in the assigned work categories within the two week review period. The auditors, however, dispute that this information was contained on the time cards they were shown.

[13] Audit Report, at D-13.

[14] In the absence of time studies, the task force auditors interviewed 43 SBC employees in order to ascertain whether some type of corroborative evidence existed theat might assist the auditors to review the accuracy of SBC time reporting. The survey time reports were not provided to the auditors and SBC explained that they were not retained and that, at one time, a four week time study had been performed. SBC has since revised its written procedures and now apparently requires each employee to provide the documentary support used to justify cost assignments and percentages.

[15] SWBT Analysis, at E-5, n.5.

[16] *Joint Cost Order*, 2 FCC Rcd 1298, at paras. 190, 207-208,

Common Carrier Bureau, acting on delegated authority, subsequently endorsed AT&T's cost allocation plan, it underscored the importance of auditing to ascertain whether AT&T's time reporting plan actually produced lawful cost allocations. Further, the Bureau explicitly concluded that only contemporaneous records, or other auditable data, could ensure an accurate audit.[17] We also stated clearly in the Joint Cost Order that we generally expected carriers "[to] maintain a complete audit trail of all cost allocations and affiliate transactions."[18]

11. In this case, it might be true that SBC's time reporting system can produce accurate time reporting, but there is no way for us to tell if the company has not performed periodic time studies or if the employees who are responsible for implementing that system do not prepare and retain contemporaneous documentation. Moreover, contrary to SWBT's assertion, an audit limited to examining the existing time reports would be useless. Although SBC's system apparently requires biweekly review by each employee of his or her work allocations as listed on time cards, it is unlikely that the employee's time would, in every two week period, exactly conform to those allocation percentages specified. Thus, it would appear to be the case that the employee must somehow "recollect" previous reports in order to verify that, over time, his or her reported time falls within the stated categories and at the listed percentages. If that recollection is not based on auditable, contemporaneous documentation, it is reasonable to ask how accurate it can actually be. This inquiry, however, is not driven by any desire to impose an accounting system on SBC's nonregulated operations. It is driven, rather,by a legitimate need to evaluate SBC's system in order to determine whether SWBT is lawfully accounting for its transactions with SBC.

12. For the foregoing reasons, we order SWBT to show cause why the Commission should not find a violation of section 32.12(b)[19] of the rules governing financial records and documentation. We also order SWBT to show cause why we should not take appropriate enforcement action, including issuing Notices of Apparent Liability for Forfeiture and ordering SWBT, pursuant to sections 215 and 218 of the Communications Act of 1934, as amended,[20] and section 32.12(b) of the rules to furnish contemporaneous SBC employee time charging records for the audit period, or otherwise conduct employee-specific time studies.

B. SBC's Marketing Allocator

13. SBC incurs two kinds of marketing costs. The first are direct marketing costs which are subsidiary-specific and which SBC charges directly to the subsidiary. The second kind of marketing costs are indirect costs, including image advertising, which SBC allocates among the subsidiaries. To do this, SBC uses an allocator that reflects both the direct-charged marketing costs it incurs and the direct-incurred marketing costs of each subsidiary. The auditors found that in 1992 there were no direct-charged marketing costs to SWBT. Nonetheless, nearly 50% of $18.6 million of indirect marketing costs (approximately $9.2 million) was allocated to SWBT. The auditors argue that application of SBC's allocator is improper in such cases because our rules for the apportionment of joint and common costs require, to the extent feasible, the apportionment of costs on the basis of direct assignment or cost causational attribution methods. The auditors concluded that SBC has not used the marketing allocator specified in the *Joint Cost Order*.[21]

14. SWBT acknowledges that we have ordered telephone companies to reflect marketing costs on a direct assignment basis in their CAMs, but contends that this requirement only applies to telephone company-specific marketing costs.[22] SWBT argues that direct assignment is inappropriate here because the costs at issue are not indirect marketing costs in the usual sense. Rather, SWBT claims that SBC undertakes various projects at the request of affiliates, including image advertising, which are designed to benefit the entire corporation, according to SWBT, and not just the particular affiliate.[23] Thus, for example, if a charity or public service organization requested SWBT or another affiliate to sponsor an activity, the request would be passed on to SBC. Sponsorship would then be handled *typicall y* as a corporation-wide activity to benefit the parent and all affiliates. The allocation approach recommended by the auditors would actually misallocate real costs in such situations, according to SWBT, because a given activity would be allocated solely to the requesting affiliate even though all affiliates benefited.[24] Where, on the other hand, SBC decides to handle sponsorship as an affiliate-specific "event," associated costs are directly assigned to that affiliate.

15. In the *Joint Cost Order* we recognized the peculiar difficulty in allocating costs associated with the joint marketing of regulated and nonregulated products and services.[25] We abjured a pure direct assignment approach because joint marketing benefits both regulated and nonregulated activities. We also recognized that joint marketing benefits nonregulated services to a disproportionate degree, and such benefits (and associated costs) cannot be captured by direct assignment, or direct or indirect attribu-

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242. Sections 215, 218 and 219 of the Communications Act, 47 U.S.C. §§ 215, 218 and 219, authorize us to require production of this documentation.

17 Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company, CC Docket 85-26, Mimeo no. 5652, at para.31, released July 11, 1986 (Common Carrier Bureau). The Commission extended the six month record retention requirement imposed on AT&T to 1 year for affected LECs in the *Joint Cost Order*. *Joint Cost Order*, 2 FCC Rcd 1298, at para. 208.

18 *Id.*, at para. 242.

19 47 C.F.R. § 32.12(b).

20 47 U.S.C. §§ 215, 218.

21 Audit Report, at D-19, D-20, and D-21. The allocator is defined as the ratio of directly assigned and attributable costs to total marketing costs. *Joint Cost Order*, 2 FCC Rcd 1298, at para. 190.

22 SWBT Analysis, at E-8.

23 *Id.*

24 SWBT points out that the auditors' approach would routinely missallocate costs if, for example, certain affiliates decided not to use SBC for their company-specific advertising needs but, instead, employed third parties. Notwithstanding that any SBC image advertising would benefit such affiliates, they would avoid paying for such benefits since the marketing allocator formula urged by the auditors would not recognize such advertising costs. SWBT Analysis, at E-9.

25 *Joint Cost Order*, 2 FCC Rcd 1298, at paras. 188-208.

tion, of costs.[26] In spite of that difficulty, we refused to limit carriers to those marketing efforts that could be directly assigned, or directly or indirectly attributed, because we recognized that regulated activities can legitimately generate so-called residual marketing costs. We specifically identified image advertising as such a residual cost,[27] and prescribed use of a marketing allocator. We clearly intended that all residual marketing costs, including image advertising costs, should be allocated using this approach.[28]

16. Nevertheless, SWBT apparently has identified a significant problem if the marketing allocator prescribed by the *Joint Cost Order* were to be applied to the way SBC and its affiliates typically conduct marketing operations, including corporate-wide image advertising. SBC's allocation method is based on the advertising dollars spent by each SBC subsidiary, including advertising dollars spent on SBC subidiary-specific advertising "as an indication of the importance of advertising to that line of business."[29] It is unclear to us how such an evaluation, unless modified, would take into account those predictable, disproportionate benefits which the *Joint Cost Order* found (and the auditors affirmed) could attach to nonregulated operations, especially start-up operations which are not otherwise well known in the marketplace.[30] On the other hand, the allocator devised by SBC may be generally consistent with cost causative principles insofar as it addresses the cost avoidance problem identified by SWBT.[31] However, before we authorize use of such an approach, we think further inquiry is necessary. We conclude that further investigation of SBC's allocator method is warranted. In particular, we require a fuller description of the development of its allocator by SBC, including how its method takes into account the disproportionate benefits that nonregulated affiliates may receive from image advertising.

17. Accordingly, pursuant to section 64.901(b)(3) of the Commission's Rules, 47 C.F.R. §64.901 we order SWBT to show cause, why it should not be ordered to modify its cost allocation methodology for image advertising and related residual marketing costs[32] to conform that methodology to the requirements imposed by the Commission's rules and policies.

C. SBC's Use of the General Allocator

18. SBC's system for allocating costs to its subsidiaries follows the cost allocation hierarchy mandated by our rules in that certain "residual" costs are allocated by use of a general allocator as a last resort.[33] The general allocator is employed only after all costs that can be directly assigned are directly assigned and other costs are attributed by use of an appropriate direct or indirect allocator.[34] Our rules mandate that this general allocator is to be computed by using a ratio based upon all expenses directly assigned or attributed to regulated and nonregulated activities.[35] The auditors, however, discovered that certain costs retained by SBC were not reflected in the computation of the general allocator. Specifically, the auditors found that SBC did not include "retained expenses" (i.e., certain expenses not passed on to affiliates, but retained on the books of SBC) in the base used for calculating its general allocator. The auditors calculate that if the general allocator had been computed properly, SWBT's share of costs allocated through the general allocator would drop from almost 70 per cent to about 43 per cent for 1992 alone.[36]

19. SWBT counters that its computation of the general allocator properly excluded expenses retained by SBC and that the auditors are incorrect in treating such expenses as "directly assigned to [SBC] stockholders."[37] According to SWBT, "stockholders are not billed for expenses, they are paid dividends."[38] SWBT argues that it would be illogical to include retained expenses in the general allocator computation. First, expenses excluded for one purpose (retention) are included for another (allocation). Second, costs that are not assigned or attributed to subsidiaries are used to determine how costs should be allocated to these subsidiaries. Finally, this can produce "absurd" results such as allocating 43 per cent of SBC's general expenses and generally allocated costs to SWBT which represents 75 per cent of SBC's investment.[39] SWBT also notes that if the auditors' interpretation of the general allocator is correct, that would "likely force SBC to reevaluate its conservative retention policy," and directly assign more costs to subsidiaries like SWBT.[40]

20. The auditors have correctly described how the general allocator should be computed. Further, we agree that the expenses retained by SBC should be included in that calculation. Section 64.901(b)(3)(iii) clearly provides that the general allocator must be computed by using "... the ratio of *all* expenses directly assigned or attributed to regulated and nonregulated activities."[41] The rules do not provide special treatment for expenses that are retained by an affiliate that happens, as a result of SBC's corporate organization, to be the parent of a telephone company subsidiary (SWBT). Stated another way, the general allocator devised in the *Joint Cost* proceeding was designed to specify how carriers would allocate residual costs, other than residual marketing expenses, between regulated and nonregulated activities. This same approach was adopted by the Commission to handle the costing of services provided

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[26] Id., at para. 196.
[27] *Id.*, n.321.
[28] *Id.*, at para. 190.
[29] SWBT Analysis, at 9.
[30] Audit Team Reply, at F-7.
[31] *See* para. 14, *supra*.
[32] In conversations with Commission staff, SWBT indicated that some costs other than image advertising cost are included in those marketing costs subject to allocation by the marketing allocator. *See also* Audit Team Reply, at F-7. SWBT should include in its discussion a complete description of such other costs. SWBT also should include a complete description of how subsidiary-specific marketing costs are directly assigned and how these subsidiary-specific costs are identified and distinguished from corporate-wide marketing costs.
[33] *See Joint Cost Order*, 2 FCC Rcd 1298, at para. 152.
[34] *See* 47 C.F.R. § 64.901(b). Although joint marketing costs are residual costs, the *Joint Cost Order* mandates marketing cost allocation per application of the marketing allocator discussed in the previous section B of this Order.
[35] 47 C.F.R. § 64.901(b)(3)(iii).
[36] Audit Report, at D-21, D-22.
[37] *Id.*, at D-22. SWBT Analysis, at E-10.
[38] *Id.*
[39] *Id.*, at E-10, E-11.
[40] *Id.*, at E-11.
[41] 47 C.F.R. § 64.901(b)(3)(iii) (emphasis added).

by affiliates to other affiliates.[42] For our purposes here, SBC is an affiliate like SWBT and the other affiliates, and certain costs that it has, in effect, assigned to itself as retained expenses must be included in the calculation of the general allocator.[43] SWBT's size within the corporation is less relevant in this context than the fact, pointed out by the auditors, that SWBT is direct-charged only 38% of total costs direct-charged to the operating subsidiaries.[44] As to the prospect that SBC might, as a result of our finding, reevaluate its cost retention policy, it can of course do so, subject to regulatory review of the lawfulness of any resultant cost allocations and their impact on telephone ratepayers.

21. We therefore order SWBT to show cause why certain expenses retained by SBC as retained expenses should not be included in the computation of the general allocator used to allocate residual costs to SWBT and SWBT affiliates pursuant to section 64.901(b)(3)(iii).

IV. ISSUES INVOLVING SWBT AND AMI

22. The audit of AMI activities sought to determine whether AMI properly charged for services provided to SWBT and whether SWBT properly recorded those charges. AMI is a subsidiary of SBC which provides various services to SWBT and other affiliates, including employee home relocation services, commercial real estate brokerage services, design and architectural services, and office leasing services. With the exception of home relocation services, SBC also provides all these activities to third parties. AMI also has an ownership interest in Majestic Associates which, *inter alia,* owns and operates the Hotel Majestic in St. Louis, Missouri. The audit issues that concern us here derive from the charging of reserved hotel accomodations at the Hotel Majestic to SWBT.

A. Reserved Rooms at the Hotel Majestic

23. Majestic Associates owns the Hotel Majestic, a 96-room hotel located near SWBT headquarters in St. Louis, Missouri. Pursuant to a contract entered into by SBC with Majestic Associates, a reserved block of rooms at the hotel (40 for four days per week, 42 weeks per year, and another 10 for 365 days per year) is made available to guests of SWBT and other affiliates. The contract rate of $80 per room per day is paid whether the rooms are occupied or not. While the contract states that SBC shall pay the charges for unoccupied rooms, the auditors found that the hotel instead bills SWBT the contract rate. SWBT records the contract charges in Account 6720. General and Administrative Expense, and a portion of them in its regulated expenses. If a guest employed by any affiliate other than SWBT occupies the room, the hotel charges a weekday rate of $65 and a weekend rate of $49 to the guest's company (e.g., SBC). The difference between these rates and the $80 contract rate was, until recently, paid by SWBT.[45]

24. The auditors concluded that, while a portion of the $80 daily contract charge for unoccupied rooms could be properly allocated to SWBT, the fact that SWBT affiliates also could use these rooms means that those affiliates should also be allocated a portion of the contract charge. The hotel could furnish no invoices or other information identifying when rooms were occupied by SWBT employees or by employees of the affiliates, and the auditors therefore could not readily determine the portion allocable to SWBT. The auditors also found that, since a substantial third party market exists for room rentals, and since the hotel's regular weekend room rate was $49 per day, the $80 per day contract rate could not be fully allocable to SWBT under the affiliate transactions rules which only allow the prevailing company price in such cases.[46]

25. SWBT counters that it is the true beneficiary of contract because the hotel is located near SWBT headquarters and the rooms are frequently occupied by SWBT guests. SWBT concludes, therefore, that the contract charges should be allocated to SWBT. SWBT rejects the auditors' finding about application of a $49 per day weekend market rate because this $49 rate is not standard, and that actual weekend rates vary based on the hotel's anticipated occupancy rate. As a result, SWBT contends, a market price cannot be calculated and the fully distributed cost-based contract rate is authorized under our rules. SWBT says that hotel invoices are not required because, as noted in its CAM, all hotel room charges are based on (and have been established to be below) fully distributed costs, while other charges such as food and beverage are charged at prevailing price.[47]

26. Since SBC effectively reserves more than 50 per cent of the Hotel Majestic's capacity for 42 weeks each year, it appears that a market rate cannot be used as the allocation benchmark. The relevant market consists of blocs of rooms reserved for corporate use and there simply is not enough capacity at the hotel for additional bloc reservations of the order of magnitude provided to SWBT. However, this fact is not dispositive as to whether or not a market rate can be developed. Such a determination could only be made if it were shown that capacity was not available at other local hotels to support similar contracts. We order SWBT to show cause that a market rate cannot be developed.

27. We also order SWBT to show cause why it should not discontinue the practice of paying room rate differentials if this practice has not, in fact, already been discontinued. Moreover, the fact that SWBT affiliates uniformly paid the $49 weekend rate seems to undercut SWBT's assertions that such a rate does not reflect true costs for service. This, in turn, raises doubts as to whether the $80 reservation rate

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[42] *See* 47 C.F.R. § 32.27(d).

[43] The *Joint Cost Order* specifically adopted a general allocator "based on total company expense," eliminating assets as a factor. *Joint Cost Order,* 2 FCC Rcd 1298, at paras. 156-159. If SWBT thinks that the real problem connected with its use of the general allocator is that SBC's corporate organization and operations present unique issues not addressed in our *Joint Cost* or *Affiliate Transactions* proceedings and, consequently, our rules, SWBT should file a rulemaking petition or otherwise seek appropriate remedy.

[44] Audit Team Reply to SWBT Analysis, at F-9.

[45] Audit Report, at D-29, D-30. SWBT says this practice has been discontinued. SWBT Analysis, at E-13.

[46] 47 C.F.R. § 32.27(d). The auditors determined that the weekday market rate was $135 per day, and so concluded that the rules did not prohibit allocating the lower $80 per day contract rate for the weekday set-asides. Audit Report, at D-30.

[47] SWBT Analysis, at E-12, E-13, and E-14.

is appropriately based on fully distributed costs.[48] Accordingly, we also order SWBT to explain in detail the development of the $80 contract rate and how it reflects our fully distributed costing requirements.

28. Finally, we find SWBT has not established that all of the costs of reserved, unoccupied rooms should be allocated to SWBT. Other affiliates also can use these rooms and are encouraged to do so. SWBT has not shown why other affiliates should not be allocated some of the contract-established costs. Apparently, it will be difficult to establish SWBT's relative use of the hotel given the hotel's invoice procedures, but this difficulty cannot be used to avoid an equitable allocation of cost. Accordingly, we order SWBT to show cause what its lawful allocation of the contract costs should be.

V. CONCLUSION AND ORDERINT CLAUSES

29. For the reasons set forth in this Order to Show Cause, we find that the federal state joint audit of SWBT has uncovered accounting practices by SWBT and its affiliates, associated with their allocation of costs and recorded charges and revenues for affiliate transactions, that are apparently inconsistent with Commission rules.

30. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 215, 217-19, and 220, and Sections 1.80, 1.701, 32.12, 32.27, and 64.901 of the Commission's rules, 47 C.F.R. §§ 1.80, 1.701, 32.12, 32.27, and 64.901, that Southwestern Bell Telephone Company SHALL SHOW CAUSE within sixty (60) days of the release date of this Order to Show Cause why the Commission should not conclude that those SWBT and affiliate accounting and cost allocation practices, identified in paragraphs 12, 17, 21, 26, 27 and 28 of this Order, violate Commission rules so that the Commission should take appropriate enforcement action, including but not limited to, issuing Notices of Apparent Liability for Forfeiture and ordering SWBT to improve its internal accounting and cost allocation practices so as to bring those practices into compliance with Commission rules and orders.

31. IT IS FURTHER ORDERED that the Secretary shall send by certified mail a copy of this Order to Show Cause to Southwestern Bell Telephone Company at One Bell Center, St. Louis, Missouri, 63101.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[48] Additionally, it would seem that what a hotel charges for its rooms on any given night would be, in part, affected by anticipated occupany rates. The risk of low occupancy rates is considerably mitigated where, as here, a large percentage of total occupany is guaranteed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-95-156

Application for authority to acquire and operate facilities for service between the United States and Iraq

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 13, 1995; Released: April 20, 1995

By the Chief, International Bureau:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States on the one hand, and Iraq on the other hand, by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-156 IS GRANTED and Sprint is authorized to:

a. lease from COMSAT and operate thirty (30) 4 kHz circuits between the international Standard A earth station located at Etam, West Virginia and the theoretical midpoint of the INTELSAT AOR satellite connecting with matching facilities furnished by Sprint's correspondent in Iraq;

b. use a combination of Sprint-owned and AT&T facilities between Sprint's technical operating center in New York City and Standard A earth station in Etam, West Virginia; and

c. use the facilities described above to furnish all of Sprint's authorized services, including switched voice service, between the United States and Iraq.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Iraq -- that is private lines which originate in the United States and terminate in Iraq or which originate in Iraq and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Iraq end, or both for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Iraq affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission Rules, 47 C.F.R. § 63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BT NORTH AMERICA, INC. File No. I-T-C-95-178

Application for authority to resell non-interconnected private line services between the United States and various overseas points.

ORDER AND AUTHORIZATION

Adopted: April 13, 1995; Released: April 20, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-178 IS GRANTED, and BT North America, Inc. (BTNA) is authorized to:

a. lease, pursuant to tariff, and operate a one-half interest in the numbers of E-1 circuits listed in the Appendix hereto from authorized common carriers for the provision of non-interconnected private line services between the United States and the points listed in the Appendix hereto.[1]

b. provide international switched services by the resale of the international switched voice services set forth in MCI's Tariff FCC No. 1, IDB Worldcom's Tariff FCC No. 1 and TRT/FTC's Tariff FCC No. 12, between the United States and the points listed in those tariffs; and

c. resell noninterconnected private lines, pursuant to IDB Worldcom's Tariff FCC No. 2 and Sprint's Tariff FCC No. 11, to the countries for which authority was granted to resell noninterconnected private lines in *BT North America*, 9 FCC Rcd 6851 (1994).

3. IT IS FURTHER ORDERED that our authorization of BTNA to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and one of the points listed in the Appendix -- that is, private lines which originate in the United States and terminate in one of the points listed in the Appendix or which originate in one of the points listed in the Appendix and terminate in the United States. In addition, BTNA may not -- and BTNA's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither BTNA nor any persons or companies directly or indirectly controlling or controlled by BTNA, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which BTNA or any persons or companies controlling or controlled by BTNA are parties.

5. IT IS FURTHER ORDERED BTNA shall be regulated as nondominant for all routes and services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] BTNA proposes to resell the international private line services pursuant to the appropriate following carriers' tariffs: IDB Worldcom Tariff FCC No. 2, Sprint Tariffs FCC Nos. 5, 7 and 11, AT&T Tariffs FCC Nos. 9, 11 and 12, MCI International Tariff FCC No. 1, MCI OTI Tariff FCC No. 3, MCI WUI Tariff FCC No. 27.

APPENDIX

COUNTRY	NO. OF CIRCUITS
Algeria	1
Antigua	1
Argentina	1
Armenia	1
Austria	5
Azerbaijan	1
Bangladesh	1
Belarus	1
Belgium	15
Bermuda	1
Bosnia	1
Brazil	6
Bulgaria	1
Cayman Islands	1
Channel Islands	2
Chile	8
China	15
Colombia	3
Croatia	1
Cyprus	1
Czech Republic	1
Denmark	7
Dominican Republic	1
Ecuador	1
Egypt	1
Estonia	1
Finland	8
Georgia	1
Greece	2
Hong Kong	15
Hungary	2
India	1
Indonesia	1
Iran	1
Ireland	6
Israel	2
Italy	8
Jamaica	1
Japan	30
Kazakhstan	1
Kyrgyzstan	1
Latvia	1
Lithuania	1
Luxembourg	6
Malaysia	2
Mexico	16
Moldova	1
Morocco	1
Netherlands Antilles	1
New Zealand	4
Nigeria	1
Norway	6
Pakistan	1
Peru	1
Philippines	2
Poland	2
Portugal	2
Romania	2
Russia	1
Saudi Arabia	2
Serbia	1
Singapore	12
Slovakia	1
Slovenia	1
South Africa	2
South Korea	5
Spain	6
Switzerland	7
Taiwan	2
Tajikistan	1
Thailand	2
Tunisia	1
Turkey	1
Turkmenistan	1
Ukraine	1
Uzbekistan	1
Venezuela	2
Vietnam	1
Zambia	1
Zimbabwe	1

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 17, 1995

Released: April 20, 1995

IN REPLY REFER TO:
1800C1-CMW
94080532

Eugene F. Mullin, Esq. and
Nathaniel F. Emmons, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Avenue
Suite 300
Washington, D.C. 20036-2604

Dear Messrs. Mullin and Emmons:

This letter responds to the August 22, 1994, Petition for Revocation of License (the "Petition"), filed on behalf of Media America Corporation ("MAC"), against Station WXYZ-TV, Detroit, Michigan, Station WEWS(TV), Cleveland, Ohio, and Station KNXV-TV, Phoenix, Arizona, all of which are licensed to Scripps Howard Broadcasting Company ("Scripps").[1] In its Petition, MAC alleges that Scripps entered into a multi-market network affiliation agreement with American Broadcasting Companies, Inc., a wholly owned subsidiary of Capital Cities/ABC, Inc. ("ABC"), which violates the Commission's territorial exclusivity rule. 47 C.F.R. § 73.658(b).

Section 73.658(b) of the Commission's Rules prohibits a station from entering into any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the ability of a station in a different community of license to broadcast a network's programming. MAC contends that in order to retain its affiliation with Scripps' Detroit and Cleveland stations, Scripps forced ABC to drop its current affiliation with MAC's Phoenix station, KTVK(TV), and enter into an affiliation agreement with Scripps' Phoenix station instead. MAC asserts that this agreement violates Section 73.658(b) of the Commission's Rules because ABC's decision was based on its desire to retain its affiliation with Scripps' stations in Detroit and Cleveland, and not on the merits of affiliating with Scripps' Phoenix station and disaffiliating with Station KTVK. MAC further asserts that, even apart from the rule violation, revocation of Scripps' licenses is warranted because of its anticompetitive behavior in forcing ABC to change Phoenix affiliates.

ABC and Scripps do not deny that a multi-market agreement was reached; nor do they deny that ABC's decision to disaffiliate with Station KTVK(TV) was premised on the agreement as a whole, and not just the merits of affiliating with Scripps' Phoenix station. However, ABC contends that it was not "forced" to change Phoenix affiliates, as MAC alleges, but that its decision was based on sound business judgment as a result of mutual business negotiations. According to Scripps and ABC, the negotiations arose as a result of Fox's recent disaffiliation with Scripps' Phoenix station and CBS' search for station affiliations in Cleveland and Detroit. ABC asserts that it was aware that CBS had offered Scripps a network affiliation in Phoenix if Scripps changed affiliations in Cleveland and Detroit to CBS. Accordingly, in order to retain its Cleveland and Detroit affiliations with Scripps, ABC countered with a proposal which included the switch in Phoenix affiliates.

The parties are in agreement as to the basic facts, although they characterize the negotiations between Scripps and ABC differently. Thus, the issue in this case is whether a multi-market agreement, which results in the shift of affiliates in a community of license because of concerns with other markets, also part of that agreement, violates our territorial exclusivity rule.

MAC argues that the rule applies to the situation at issue, since Scripps and ABC entered into an agreement which prevents ABC from continuing its affiliation with Station KTVK, a station in a different community of license, in order to retain its affiliations with Scripps' Detroit and Cleveland stations. Scripps and ABC contend that the territorial exclusivity rule prohibits only agreements which hinder or prevent a station in an overlapping or neighboring area from carrying a network's programming. Further, Scripps and ABC argue that the rule is applicable only where a community of license is being deprived of its own network affiliate -- not where there is a shift of network affiliation in the same community of license.

As originally adopted, the Commission's territorial exclusivity rule permitted a station to contract with a network for the exclusive right to broadcast programming within its service contour. The Commission amended the rule in 1955 to "limit the geographic bounds wherein a television broadcast station may contract for territorial exclusivity." *Amendment of Section 3.658(b) of the Commission's Rules and Regulations*, 12 R.R. 1537 (1955). The Commission found that the original rule, which allowed stations to contract for exclusivity beyond their communities of license and to preclude stations in nearby communities with overlapping coverage from receiving programming, was not "conducive to the rapid and effective development of television service to the public." 12 R.R. at 1542. Accordingly, the Commission ruled that a station's exclusive right to carry a network's programming should be limited to the area of its community of license.

The clear intent of this amendment was to ensure that stations in communities nearby those with network affiliates were able to compete for programming. Cases applying this rule have reflected this intent. *See*, for example, *American Broadcasting Co.*, 17 R.R. 458 (1958) and *Columbia Broadcasting System, Inc.*, 17 R.R. 439 (1958). In both of these cases allegations were made that, as a result of a station's desire for exclusivity, a station and network entered into an agreement which prevented the carriage of

[1] In addition to the Petition, we also have before us a September 21, 1994, Opposition filed by Scripps, a Response of ABC dated September 21, 1994, and MACS' October 3, 1994, Consolidated Reply.

network programming in a nearby area or community. Neither of these cases involved a switch of affiliations in the same community and MAC has cited no such decisions. Unlike the cases interpreting this rule, no attempt has been made in this case to prevent or limit a community from having its own network programming because of a nearby station's desire for territorial exclusivity. Rather, as a result of a multi-market agreement with Scripps, ABC is merely switching affiliations from one station to another in the same community of license.

. The Commission's territorial exclusivity rule was not adopted to guarantee a station the right to carry network programming. Rather, in adopting this rule, the Commission was aware of the economic factors that play a role in network affiliation decisions. The territorial exclusivity rule was adopted only to give stations the "maximum opportunity" to "compete for network programming." 12 R.R. 2d at 1542. In adopting this rule, the Commission recognized that "the important part that economics play in network-station contractual relationships will continue to function." 12 R.R. 2d at 1542. In cases applying this rule, the Commission reaffirmed that networks have no obligation to affiliate with a particular station and that the Commission will not ordinarily interfere with the business judgments of networks. *See The Helen Broadcasting Company Limited Partnership,* 5 FCC Rcd 2829 (1990) and *RCA Corp. (G.E. Merger),* 60 R.R. 2d 563 (1986).

Based upon our review of the pleadings before us, and the administrative history of the Commission's territorial exclusivity rule, we do not find MAC's arguments persuasive. The territorial exclusivity rule has not been applied in the past to protect distant market stations' affiliations and we see no reason under the circumstances presented in this case to alter that approach now. A network's decision to switch affiliates in a community of license, even if such a change arises as a result of a multi-market agreement, does not threaten the public's interest in market-based network service and is not the kind of agreement or understanding that falls within the intended scope of the rule.

Further, in the absence of a rule violation, we need not consider MAC's allegations of anticompetitive misconduct. In accordance with established policy, where no violation of Commission Rules or policies is found, such allegations are properly addressed by a court of competent jurisdiction, the Federal Trade Commission, or other governmental units responsible for policing such activity, before being considered by the FCC. *See The Helen Broadcasting Company Limited Partnership,* 5 FCC Rcd at 2831-2832; *Stockholders of Viacom International, Inc.,* 2 FCC Rcd 6713 (1987).

Accordingly, in light of the foregoing, we hereby deny MAC's Petition.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

cc: Donald Zeifang, Esq.
Joel Rosenbloom, Esq.
Alan Braverman, Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLTEL Service Corporation, AAD 93-30
on behalf of ALLTEL Arkansas, Inc.,
and Perco Telephone Company

Petition for Waiver of the
Definition of "Study Area"
Contained in Part 36, Subpart H,
Appendix-Glossary,
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1995; Released: April 21, 1995

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On February 28, 1994, ALLTEL Service Corporation ("ALLTEL"), on behalf of its telephone affiliates ALLTEL Arkansas, Inc. ("ALLTEL-Arkansas") and Perco Telephone Company ("Perco") (collectively, "Petitioners") filed a petition for waiver ("Petition") of the definition of "Study Area" contained in Part 36, Subpart H, Appendix-Glossary, of the Commission's rules. This waiver would allow ALLTEL-Arkansas to change its study area boundary to conform to its recently approved merger with Perco.[1] Petitioners request that this consolidation of the two study areas be approved retroactively to become effective on December 31, 1993. On March 22, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on ALLTEL's petition for waiver.[2] We received comments supporting the petition from two parties: the National Exchange Carrier Association, Inc. ("NECA") and the United States Telephone Association ("USTA"). At the request of Bureau staff, ALLTEL provided additional financial and cost data concerning the petition.[3] In this order, we find that consolidating the ALLTEL-Arkansas and Perco study areas will serve the public interest, and we therefore grant the Petition, in part, as explained more fully below.

II. BACKGROUND

2. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level.[4] For jurisdictional separations purposes, the Commission adopted a rule freezing study area boundaries effective November 15, 1984.[5] The Commission took that action, in part, to ensure that local exchange carriers ("LECs") do not set up high-cost exchanges within their existing service territories as separate study areas to maximize high-cost support.[6] The study area freeze also prevents LECs from transferring exchanges among existing study areas to increase interstate revenue requirements and compensation. A LEC must apply to the Commission for a waiver of that rule if the LEC wishes to sell an exchange to another carrier, because such a transaction would have the effect of changing the study area boundaries.[7]

3. Waiver of commission rules is appropriate only if special circumstances warrant a deviation from the general rule[8] and such deviation will serve the public interest.[9] In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission employs a three-prong standard: first, that the change does not adversely affect the Universal Service Fund ("USF") support program; second, that the state commission(s) having regulatory authority does not object to the change; and third, that the public interest supports the change.[10] In evaluating whether grant of a waiver request would adversely affect the USF,[11] the Commission applies a "one percent" guide-

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[1] On December 29, 1993, the Arkansas Public Service Commission ("Arkansas PSC") approved the merger between ALLTEL-Arkansas and Perco effective December 29, 1993. Under the Arkansas PSC's Order ALLTEL-Arkansas is the surviving corporation of the consummated merger. *See* Arkansas Public Service Commission Order, Docket No. 93-348-U, Order No.2 (Dec. 29, 1993)("Arkansas PSC Order").

[2] Public Notice, 9 FCC Rcd 1556 (Com. Car. Bur. 1994).

[3] Ex parte letters from Carolyn C. Hill, ALLTEL Service Corporation, to Adrian Wright, FCC, dated April 18, 1994 ("April 18 Supplement"); July 19, 1994 ("July 19 Supplement"); and Sept. 29, 1994 ("Sept. 29 Supplement"). Ex parte letter from Carolyn Hill, ALLTEL Service Corporation, to Daniel Gonzalez, FCC, dated Sept. 30, 1994 ("Sept. 30 Supplement").

[4] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between a carrier's state and interstate operations. See generally 47 C.F.R. §§ 36.1-36.741.

[5] 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area" (1993). *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommendation*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendation*). *See also* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*).

[6] *See 1985 Order Adopting Recommendations*, 50 Fed. Reg. 939, 940. *Also see 1984 Joint Board ecommendation*, 49 Fed. Reg. 48325, 48337.

[7] 47 C.F.R. Part 36, Appendix-Glossary. *See also* 47 C.F.R. § 1.3.

[8] *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir 1990).

[9] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir 1969).

[10] *See* US West Communication, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, FCC 95-4, released Jan. 5, 1995, (*US West-Eagle Study Area Order*) at para. 5.

[11] SF PROCEDURE SF RULE *See Joint Board Recommended Decision*, 49 Fed. Reg. at 48337, para. 65. The Commission created the USF to preserve and promote universal service. *See*

line to study area waiver requests filed after January 5, 1995.[12] This guideline does not apply in the instant case because Petitioners filed before that date.

III. PETITION

4. Petitioners seek a waiver of the rule freezing study area boundaries to permit them to consolidate Perco's study area with ALLTEL-Arkansas' study area, both of which are in rural Arkansas. ALLTEL-Arkansas would be thez surviving corporation. Perco is a LEC with seven exchanges serving approximately 4,000 access lines. ALLTEL-Arkansas is a LEC with 53 exchanges serving approximately 71,000 access lines. Both ALLTEL-Arkansas and Perco are cost companies for purposes of interstate access settlements.[13]

5. Petitioners state that this consolidation would have a negligible effect on their combined USF draw. Petitioners contend that, in light of the Arkansas PSC's recent approval of Petitioners' corporate merger, the Commission should approve the study area waiver so Petitioners' interstate and intrastate reporting would be consistent. Petitioners further contend that the consolidation would promote the public interest and benefit customers by reducing the costs of service maintenance and administration.[14] Petitioners submit that the consolidation would result in a reduction of $170,000 in the annual interstate revenue requirements for the two study areas.[15]

6. Petitioners further request that the consolidation of the Perco and ALLTEL-Arkansas study areas become effective as of December 31, 1993, two days after the date on which the Arkansas PSC approved ALLTEL's application. Petitioners claim that retroactive approval to December 31, 1993 would enable them to avoid problems resulting from the "split reporting" required for two separate study areas. Petitioners further claim that retroactive approval would permit the reduction of $170,000 in annual interstate revenue requirements to begin at the earliest possible date.[16]

IV. DISCUSSION

7. The consolidation of study areas located within the same state, as Petitioners propose, is the type of study area reconfiguration that the Commission encourages.[17] Such a consolidation will likely result in reduced regulatory expenses both with respect to the intrastate and interstate jurisdictions. After the merger, regulators will need to scrutinize the operations of only one study area rather than two. Moreover, the consolidation proposed by Petitioners should result in significant administrative savings to ALLTEL. Because the jurisdictional separations of costs and revenues is based on cost studies performed at the study area level, ALLTEL will be able to eliminate one set of cost studies after reducing the two study areas to one.[18] We expect that the Arkansas PSC will ensure that those savings eventually will be passed on to local ratepayers through reduced local rates.

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows LECs with high local loop plant costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in study areas receiving such assistance. To determine which LEC study areas are eligible for USF support, the USF rules prescribe two eligibility thresholds for study areas having 200,000 or fewer working loops. The first threshold occurs at 115 percent of the national average unseparated loop cost per working loop. When loop cost in a particular study area exceeds the first threshold, the study area is eligible for support equal to 65 percent of the loop cost in excess of that threshold. The second threshold occurs at 150 percent of the national average unseparated loop cost per working loop. When loop cost exceeds the second threshold, the study area is eligible for support equal to 75 percent of the loop cost in excess of that threshold. *See* 47 C.F.R. § 36.631.

[12] ULES The Commission stated that no waiver of the rule freezing study area boundaries should result in an annual aggregate shift in USF assistance in an amount equal to or greater than one percent of the total USF, unless the parties can demonstrate extraordinary public interest benefit. The USF effect for the year must be computed on an annualized basis. To prevent carriers from evading this limitation by disaggregating a single large sale of exchanges into a series of smaller transactions that in the aggregate have the same effect on the USF, the Commission further requires that the "one percent" guideline be applied to all study area waivers granted to either carrier, as a purchaser or seller, pending completion of the current review of the USF program. In this context, the Commission defines the term "carrier" to include all affiliated carriers *(i.e.,* those carriers that are in common control, as the term "control" is defined in Section 32.9000 of the Commission's rules, 47 C.F.R. § 32.9000). *See US West-Eagle Study Area Order* at paras. 14-17.

[13] Petition at 1-2. "Cost Companies" are those exchange carriers receiving compensation for the use of their facilities in originating and terminating interstate telecommunications services on the basis of their actual costs.

[14] *Id.*

[15] *Id.* at 2. According to ALLTEL the reduction in the interstate revenue requirements of the combined properties is largely due to the jurisdictional separations rules for local switching equipment. Pursuant to Section 36.125(f) of our rules, Perco, which has fewer than 4,000 access lines, presently applies a "multiplier" known as the Dial Equipment Minutes (DEM) weighting factor to its local switching equipment investment. The application of this factor substantially increases the allocation of this investment to the interstate jurisdiction. If the two study areas are combined, Perco would be part of a study area with more than 70,000 access lines. Under our rules, study areas of that size do not qualify for the use of the interstate "multiplier." As a result, a smaller percentage of Perco's local switching equipment investment would be allocated to the interstate jurisdiction. *See* Sept. 29 Supplement at 1.

[16] Sept. 30 Supplement. *See generally,* Letter from C. Hill, ALLTEL, to K. Nilsson, FCC, dated Dec. 8, 1994, for an explanation as to how the reduction of $170,000 in revenue requirements would affect rates.

[17] *See generally* ALLTEL Service Corp., Petition for Waiver of the Definition of Study Area, Memorandum Opinion and Order, 9 FCC Rcd 4450, 4451, paras. 6-7 (Com. Car. Bur., 1994); ALLTEL Service Corp., Petition for Waiver of the Definition of Study Area, Memorandum Opinion and Order, 8 FCC Rcd 6411, 6411, para. 6 (Accounting & Audits Division, 1993); *Study Area Notice,* 5 FCC Rcd 5974, 5974-75, at paras. 6 and 17; *1984 Joint Board Recommendation,* 49 Fed. Reg. 48325, at para. 66; *1985 Order Adopting Recommendation,* 50 Fed. Reg. 939, at para. 1;

[18] The claimed reduction in maintenance expense, however, appears less substantial as a potential benefit from consolidating study areas. Maintenance requirements do not appear to be determined by whether there is a change in a study area boundary that is used for jurisdictional separations purposes. *See generally* 47 C.F.R. Part 36.

8. In addition, the proposed consolidation should also benefit interstate ratepayers. The reduction in interstate revenue requirements ($170,000 per year) that will result from the merger of the two companies, and the consequent reduction in DEM weighting,[19] will benefit interstate ratepayers by reducing the charges that interstate interexchange carriers will have to pay for access to ALLTEL's local exchange facilities. Finally, the proposed consolidation will not increase ALLTEL's USF draw and thus will not adversely affect the USF program.[20] For these reasons, Petitioners have demonstrated that a waiver of the rules freezing study areas is warranted. We therefore grant the study area waiver petition to permit ALLTEL-Arkansas to change its study area boundary to conform to its merger with Perco.

9. With regard to Petitioners' request that this action be made retroactive to December 31, 1993, we find Petitioners have not supported their claim that a later effective date would pose significant problems. They state that a later date will force them to do "split reporting" for 1994 because intrastate reporting will be on a consolidated basis for that period but interstate reporting will not. They fail to show, however, that this incongruence will impose significant reporting costs on ALLTEL. Indeed, they provide no estimates of what those costs might be. Consequently, we find that retroactive approval is not warranted. This order therefore shall become effective thirty calendar days from the date of release of this order as provided by Section 408 of the Communications Act of 1934.

V. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition of ALLTEL Service Corporation, on behalf of its affiliates ALLTEL-Arkansas, Inc. and Perco Telephone Company, for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED IN PART, to the extent described above.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[19] See note 16, *supra*.

[20] Although Petitioners estimate that USF assistance will increase by two-tenths of one percent, we have determined that such an increase will not occur. In similar cases involving a LEC's proposed consolidation of study areas, we have found that, under the USF rules, the USF draw will not increase unless the consolidation is accompanied by plans to update facilities, expand the customer base or reconfigure the local network. ALLTEL has not expressed an intent to take any such action.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the Interstate
Interexchange Marketplace

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 4, 1995; Released: April 21, 1995

By the Commission:

I. INTRODUCTION

1. On May 14, 1993, with the advent of 800 number portability, we acted on an intent first expressed in the *Interexchange Order*,[1] and further streamlined our regulation of most of AT&T's 800 services.[2] We concluded that, as initially envisioned in the *Interexchange Order*, the implementation of number portability rendered the 800 services marketplace substantially competitive, and that the elimination of price cap regulation of AT&T's 800 services would be in the public interest. Sprint Communications Company L.P. (Sprint) filed a petition for reconsideration of the *Second Report and Order* on June 21, 1993. After reviewing the record before us, we reaffirm our conclusion that further streamlined regulation of AT&T's 800 services is in the public interest. We therefore deny Sprint's petition for reconsideration.

II. BACKGROUND

2. In the *Interexchange Proceeding*, we conducted a comprehensive examination of the state of competition in the interstate interexchange marketplace. We found that significant competition existed in business services, and therefore adopted a series of reforms designed to reduce regulatory burdens on AT&T's provision of most business services.[3] Under "further streamlined regulation," AT&T is permitted to file its business services tariffs on fourteen days notice, and those tariffs are presumed lawful for purposes of advance tariff review. In addition, price cap ceilings, floors, and rate bands no longer apply to those tariffs.[4] At the time of the *Interexchange Proceeding*, we declined to extend this regulatory streamlining to AT&T's 800 services and other inbound services.[5] We observed that 800 numbers were not yet portable, and that the lack of number portability constituted a barrier to full competition in 800 services.[6] Based on this finding, we retained price cap regulation of AT&T's 800 services.[7] We found, however, that no party had identified any other significant barriers to 800 services competition, and expressed our specific intent to further streamline regulation of such services when 800 number portability became generally available.[8]

3. 800 numbers became portable on May 1, 1993, through the implementation of a database system of 800 access.[9] In anticipation of this development, AT&T filed a petition on February 17, 1993, asking that we streamline regulation of its 800 services. On May 14, 1993, we issued the *Second Report and Order*, substantially granting AT&T's petition. We determined that number portability rendered the 800 services market substantially competitive, and we therefore adopted streamlined regulation for most of AT&T's 800 services.[10]

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[1] *Competition in the Interstate Interexchange Marketplace*, Report and Order, Docket No. CC 90-132, 6 FCC Rcd 5880, 5905 n.233 (1991) (*Interexchange Order*), *recon.*, 6 FCC Rcd 7569 (1991) (*Sua Sponte Reconsideration Order*), *further recon.*, 7 FCC Rcd 2677 (1992), *further recon.*, 8 FCC Rcd 2659 (1993).

[2] *Competition in the Interstate Interexchange Marketplace*, Second Report and Order, Docket No. CC 90-132, 8 FCC Rcd 3668, 3671-72 (1993). We did not, however, further streamline our regulation of AT&T's 800 Directory Assistance. *See infra* note 10.

The term "800 services" refers to Price Cap Basket 2 offerings by AT&T that allow customers to agree in advance to pay for all calls made to them using a designated "800" number. *See generally* 47 C.F.R. § 61.42(b)(2). The term "inbound services" refers to all other services that use 800 numbers.

[3] *Interexchange Order*, 6 FCC Rcd at 5880-82, 5893-94. We excluded AT&T's Residential and Small Business Services Basket (Basket 1), including Basket 1 operator services and international message telephone service (IMTS), from further streamlining, because there was insufficient evidence that the marketplace for these services was subject to substantial competition. *See id.* at 5906-08.

[4] *Id.* at 5894.

[5] *Id.* at 5903-06.

[6] *Id.* at 5904. In this order, "number portability" refers to the ability of 800 services customers to keep their 800 number when changing carriers. Prior to the implementation of 800 number portability, specific 800 numbers were assigned to each carrier, and customers wishing to switch 800 service providers would have to surrender their existing numbers. For customers that placed value in retaining their 800 numbers, especially those businesses that had invested in advertising based on their existing numbers, the fact that numbers were not portable constituted a disincentive to switch carriers. AT&T, which had long been the only provider of 800 services, retained most of the available 800 NXX codes even after competitors entered the marketplace. As a result, AT&T had significant market power among 800 service providers before number portability became possible.

[7] *Id.* at 5905.

[8] *Id.* at 5905 & n.233.

[9] *See Provision of Access for 800 Service*, Report and Order, 4 FCC Rcd 2824 (1989) (*800 Order*), recon., 6 FCC Rcd 5421, 5425 (1991) (*800 Reconsideration Order*), further recon., 8 FCC Rcd 1038 (1993), Second Report and Order, 8 FCC Rcd 907 (1993); *see Provision of Access for 800 Service*, Order, 7 FCC Rcd 8616 (1993) (*Extension Order*) (extending the number portability implementation date from March 4, 1993 to May 1, 1993).

[10] *See Second Report and Order*, 8 FCC Rcd at 3669. Because 800 Directory Assistance remained a monopoly service and was not affected by number portability, we retained price cap restraints for AT&T's 800 Directory Assistance. *Id.* at 3671.

III. PLEADINGS

4. Sprint asks us to reconsider our decision to streamline our regulation of AT&T's 800 services. Sprint asserts that the Commission should have waited until after number portability had been implemented before considering further streamlining, and should have made specific findings that the 800 services market was competitive before taking action.[11] According to Sprint, the Commission failed to conduct such an investigation in the *Second Report and Order*, and treated the elimination of price cap regulation on AT&T's 800 services as a mere "ministerial task" once 800 numbers became portable.[12] Sprint notes that, although the *Second Report and Order* was released after the implementation of number portability, the record in that proceeding closed on March 22, 1993, prior to the initiation of number portability.[13]

5. Sprint also claims that certain recent actions by AT&T undermined the Commission's efforts to mitigate AT&T's advantage in the 800 services marketplace.[14] Specifically, Sprint contends that AT&T has sought to prevent customers from exercising their "fresh look" rights to terminate their service arrangements with AT&T without liability.[15] According to Sprint, AT&T has imposed "dramatically" higher rates upon customers who exercise their fresh look rights but temporarily remain on AT&T's network following the end of the ninety-day fresh look window. Sprint also claims that AT&T has sought to intimidate customers by sending letters and customer advisories falsely alleging that services provided by Sprint and other AT&T competitors pursuant to "secret deals" are illegal and therefore unenforceable. To support its allegations that such actions have had a deleterious effect on competition in 800 services, Sprint cites a *Wall Street Journal* article suggesting that as of August 1993, AT&T had retained most of its large corporate 800 number customers and picked up $710 million in additional business following the implementation of number portability.[16]

6. In its opposition, AT&T states that Sprint has provided no new facts or analysis to justify reconsideration of the *Second Report and Order*.[17] AT&T argues that the Commission expressed its unambiguous intent in the *Interexchange Order* to streamline regulation of AT&T's 800 services once 800 numbers became portable.[18] AT&T further claims that the Commission did investigate the competitiveness of the 800 services marketplace in the *Interexchange Order* and in the *Second Report and Order*.[19] AT&T dismisses Sprint's allegations about its marketing practices as "unsupported and irrelevant," and argues that the Commission has already considered such claims and determined that they would be addressed in other orders.[20]

IV. DISCUSSION

7. We find that Sprint has failed to demonstrate that the *Second Report and Order* should be modified. In the *Interexchange Proceeding*, we specifically solicited and evaluated comments on the state of competition in 800 services.[21] We determined that "no party has identified any . . . significant barriers to 800 services competition," other than the absence of number portability,[22] and we expressed our intent to streamline regulation of AT&T's 800 services "when 800 number portability is generally available."[23] Before adopting the Second Report and Order, we gave interested parties a further opportunity to identify any remaining significant barriers to 800 services competition.[24] We concluded once again that number portability had been the only significant barrier to substantial competition in the 800 services marketplace.[25] Therefore, we implemented further streamlined regulation of AT&T's 800 services.

8. We are unpersuaded by Sprint's argument that we should have deferred action on AT&T's petition so that commenters could have identified additional barriers to competition that might have arisen after number portability had been put into effect. Sprint and other IXCs have been competing against AT&T for customers of 800 services since 1986. Sprint and other parties had a full opportunity to identify obstacles to competition in the 800 marketplace in the proceedings leading to the 1991 *Interexchange Order* and the 1993 *Second Report and Order*. They did not do so. Indeed, even now on reconsideration Sprint has not identified any barriers to 800 services competition that would warrant the reimposition of price cap regulation of AT&T's 800 services. We therefore reject Sprint's claim that the *Second Report and Order* was based on insufficient information about the competitiveness of the 800 services marketplace.

9. We also reject Sprint's allegations that AT&T's practices have prevented the development of substantial competition in 800 services. Sprint has previously raised the argument that AT&T effectively precluded customers from exercising their fresh look rights. The Common Carrier Bureau considered this claim in connection with AT&T's fresh look tariff transmittal. After reviewing these allegations and the rest of the record, the Bureau concluded that AT&T's tariff filing did not, on its face, violate any statute or Commission rule or policy.[26] Moreover, to assist customers in exercising their fresh look rights and to dispel any confusion that may have deterred customers from do-

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11 Sprint Petition at 3.
12 *Id.* at 3-4.
13 *Id.* at 3.
14 *Id.* at 5-6.
15 Under our "fresh look" policy, AT&T customers with bundled packages of services that included 800 or inbound service were permitted to terminate those service arrangements without being contractually liable for such termination. Customers had ninety days after implementation of number portability to exercise this right.
16 Sprint Reply at 6.
17 AT&T Opposition at 2.
18 *Id.* at 2-3.
19 *Id.* at 3-4.
20 *Id.* at 4.
21 *See Competition in the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2641 (1990) (*Interexchange NPRM*); *Interexchange Order*, 6 FCC Rcd at 5904-06.
22 *Interexchange Order*, 6 FCC Rcd at 5905 n.233.
23 *Id.*
24 *Second Report and Order*, 8 FCC Rcd at 3668-71.
25 *Id.* at 3669-71.
26 AT&T Communications Tariff FCC No. 12, Transmittal Nos. 4941 and 4999, DA 93-431, 8 FCC Rcd 2679 (1993). The Bureau also concluded that an investigation of the tariff's lawfulness was not warranted at that time. *Id.*

ing so, the Commission issued a public notice explaining the fresh look policy and the rights of customers who availed themselves of this option.[27]

10. Sprint's generalized allegations about other anticompetitive practices do not convince us that customers were intimidated from exercising their fresh look rights, or, more importantly, that AT&T was able to so undermine our fresh look policy as to effectively thwart competition in 800 services. The *Second Report and Order* determined that streamlined regulation of most of AT&T's 800 services would serve the public interest, and Sprint has not presented any arguments that would justify altering that conclusion.[28] There is evidence that AT&T has lost market share in 800 services since number portability was put into effect.[29] More importantly, carriers now actively and successfully competefor 800 services customers based on price, features, and service.[30] Sprint has failed to demonstrate that AT&T's alleged market power or structural advantages, rather than these competitive forces, determine the shape of the 800 services marketplace today. If Sprint is aware of specific actions by AT&T that violate the Communications Act, it should make those allegations to us and we will take any necessary remedial action. We find nothing in Sprint's petition to suggest that the reimposition of price cap regulation on AT&T's 800 services is a more appropriate regulatory response.

V. CONCLUSION

11. We have acted carefully to ensure that our lifting of price cap regulation for various of AT&T's business and 800 services has been in the public interest. As envisioned in the Interexchange Order and the *Second Report and Order,* number portability has rendered the 800 services market substantially competitive. We therefore deny Sprint's petition for reconsideration.

VI. ORDERING CLAUSE

12. Accordingly, pursuant to the authority contained in sections 1, 4, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 201-205, IT IS ORDERED that the Petition for Reconsideration of Sprint Communications Company, L.P. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[27] Consumer Public Notice in CC Docket No. 90-132 Regarding Fresh Look Rights, March 10, 1993.

[28] The *Wall Street Journal* article cited in Sprint's reply does not demonstrate that number portability has failed to facilitate competition in 800 services. The article indicated that AT&T had managed to retain many of its large 800 services customers thanks to the "marketing savvy" of one of its executives and to its ability to match competitors' offers. *See* John J. Keller, *In a New Offensive, AT&T Reassigns Nacchio to Fight Long-Distance Rivals,* Wall Street Journal, August 10, 1993, at B5. Such information is consistent with our belief that competition, rather than the anticompetitive exercise of market power, would drive the 800 services marketplace after the advent of number portability. Furthermore, the *Wall Street Journal* article appeared barely three months after 800 number portability had been put into effect, and more recent evidence further supports the argument that the market is substantially competitive. *See infra* note 30.

[29] *See, e.g., AT&T Executive Says Legislation is Essential for "Industry Repositioning,"* Common Carrier Week, October 3, 1994 (stating that according to AT&T Executive Vice President Alex Mandl, AT&T's 800 services have lost market share since the implementation of number portability); Joanie Wexler, *AT&T Advances on 800 Front,* Network World, May 2, 1994, at 7 (noting that according to Joe Noel, general manager of telecommunications research at Intelliquest, Inc., AT&T had lost $500 million in 800 services business to MCI in the past year).

[30] *See, e.g.,* Peter Weaver, *Is it Time to Join the 800 Network?* Nation's Business, December, 1994, at 37 ("Until 1987, only AT&T offered 800 numbers. Now, there's intense competition among more than 400 companies. . . ."); Neil Hediger, *One Year Later, the Story is Only Beginning to Unfold: 800-Number Portability's First Birthday,* Telemarketing, May, 1994, at 84 ("Today, vendors compete with one another based on features, reliability, service and overall value, not on who owns the 800 exchange."); *U.S. Industrial Outlook* at 29 (1994) ("Competition heated up in the 800-calling market as thousands of customers reportedly decided to switch carriers [after the implementation of number portability].").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-227

In the Matter and Applications of

WALTER S. KELLEY, TRUSTEE WFXL(TV)	File No. BALCT-931216KM
NEWSOUTH BROADCASTING, INC. WFXL(TV) Albany, Georgia	File No. BTCCT-910308KE (PREVIOUSLY DISMISSED)

Order to Show Cause Why the License of WFXL(TV) Should Not be Revoked; Application for Assignment of License to SGA Associates, Inc.; Application for Transfer of Control to NewSouth Broadcasting, Inc., Debtor-in-Possession

TIMOTHY S. BRUMLIK Permittee of Low Power Television Station W07BZ, Orlando, Florida	File Nos. BLTVL-891107JE BAPTVL-900105IA BAPTVL-910607IB (PREVIOUSLY DISMISSED)

Order to Show Cause Why the Permit of W07BZ Should Not Be Revoked; Application for License to Cover Construction Permit; Application for Assignment of Construction Permit to Robert Sandusky; and Application for Assignment of Construction Permit to Timothy S. Brumlik, Debtor-in-Possession

NEWSOUTH MEDIA CORPORATION Permittee of Low Power Television Station W12CD, Altamonte Springs, Florida	File Nos. BMPTVL-900129IA BAPTVL-900105IC (PREVIOUSLY DISMISSED)

Order to Show Cause Why the Permit of W12CD Should Not Be Revoked; Application for Modification of Construction Permit; and Application for Assignment of Construction Permit to Televista, Inc.

NEWSOUTH BROADCASTING, INC. Permittee of Low Power Television Station W13BO, Valdosta, Georgia	File Nos. BMPTVL-900125IA BMPTVL-891208R4 BLTVL-900125IB BAPTVL-900703IE (PREVIOUSLY DISMISSED)

Order to Show Cause Why the Permit of W13BO Should Not Be Revoked; Application to Replace Expired Construction Permit; Application for Modification of Construction Permit; and Application for Assignment of Construction Permit to General Management Consultants, Inc.

TIMOTHY S. BRUMLIK Permittee of Low Power Television Station W12CC, Cocoa, Florida	File Nos. BAPTVL-900105IB BMPTVL-910301JG BAPTVL-910607IC (PREVIOUSLY DISMISSED)

Order to Show Cause Why the Permit of W12CC Should Not Be Revoked; Application for Assignment of Construction Permit to Robert Sandusky; Application for Extension of Construction Permit; and Application for Assignment of Construction Permit to Timothy S. Brumlik, Debtor-in-Possession

NEWSOUTH BROADCASTING, INC. Lumber City, Georgia	File No. BPTVL-870702TX (PREVIOUSLY DISMISSED)

For a Construction Permit for a New Low Power Television Station

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1995; Released: April 21, 1995

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it (1) a timely "Petition for Reconsideration" of its *Memorandum Opinion and Order*, 9 FCC Rcd 1923 (1994) (*"MO&O"*) filed May 31, 1994, by Manuel Cantu ("Cantu"); (2) an "Opposition to Petition for Reconsideration" filed June 15, 1994, by Walter W. Kelley, Trustee, and SGA Associates,

Inc. ("Kelley/SGA"); and (3) a "Reply" filed June 28, 1994, by Cantu.[1] For the reasons which follow, we deny reconsideration.

I. BACKGROUND

2. On August 23, 1991, the Commission released an *Order to Show Cause and Hearing Designation Order*, 6 FCC Rcd 5047 (1991), which, *inter alia*, contemplated the revocation of the license for Station WFXL(TV) because of the criminal convictions of NewSouth Broadcasting, Inc.'s principal, Timothy S. Brumlik ("Brumlik"). Before the hearing commenced, the Commission granted a Petition for Extraordinary Relief which sought approval for the sale of WFXL(TV) to the Bonita Corporation ("Bonita") and Cantu pursuant to the policy established by the Commission in *Second Thursday Corp.*, 22 FCC 2d 515, *recon. granted*, 25 FCC 2d 112 (1970) (*"Second Thursday"*). *NewSouth Broadcasting, Inc.*, 8 FCC Rcd 1272 (1993). The *Second Thursday* policy permits the assignment of the license or permit of a broadcast station of a bankrupt licensee in hearing if "the individuals charged with the misconduct will have no part in the proposed operations and will derive no benefit from favorable action on the application or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." *Second Thursday*, 22 FCC 2d at 516. In granting the petition for extraordinary relief, the Commission observed that NewSouth and Brumlik had filed petitions for bankruptcy protection, that Brumlik would have no role in the future operation of the station, that the proceeds from the sale of the station would be paid into the Bankruptcy Court for distribution for the benefit of innocent creditors, and that Brumlik would receive, at most, an incidental benefit from the elimination of his potential liability. *NewSouth Broadcasting, Inc.*, 8 FCC Rcd at 1273.

3. When Cantu failed to make a scheduled payment, the U.S. Bankruptcy Court for the Middle District of Georgia, Albany Division, cancelled the sales agreement and appointed Walter W. Kelley ("Kelley") as Chapter 11 Trustee of the bankruptcy estate of NewSouth. On September 22, 1993, the Commission approved the *pro forma* assignment of the WFXL(TV) license to Kelley, Trustee in Bankruptcy. Kelley then sought and obtained Bankruptcy Court approval for the sale of WFXL(TV)'s assets to SGA Associates ("SGA") for $1,900,000, and their assignment application and accompanying Petition for Extraordinary Relief were filed on December 15, 1993.

4. On January 28, 1994, Cantu filed a Petition to Deny the assignment of the license of WFXL(TV) from Kelley to SGA. In his petition, Cantu argued that approval of the Kelley/SGA application would be inconsistent with the *Second Thursday* policy because Brumlik would receive a substantial amount of the proceeds of the sale of WFXL(TV) as an individual creditor of NewSouth and as the owner of another NewSouth creditor. According to Cantu, Brumlik's individual and corporate claims as secured creditors of NewSouth totalled more than $285,000, which benefit was too substantial to enable the transaction to qualify for *Second Thursday* treatment.

5. In opposition, Kelley and SGA pointed out that Brumlik himself was bankrupt and that, on February 7, 1994, his bankruptcy proceeding had been converted to a Chapter 7 proceeding. They submitted declarations by various individuals, including the Trustee in the Brumlik bankruptcy. All agreed that Brumlik would not directly benefit from the sale of WFXL(TV). Further, Kelley declared that he intended to object to the claims of Brumlik and the Brumlik creditor company because neither had filed any proofs of claim. Finally, Kelley reported that the Bankruptcy Court had determined that all creditors except a bank and the Internal Revenue Service would be unsecured. Consequently, even if the Bankruptcy Court overruled Kelley and allowed the individual and corporate claims of Brumlik, Kelley estimated that the most Brumlik's bankruptcy estate could recover would be $36,000. In Kelley's view, this amount was a *de minimis* benefit when compared with the distributions to the other creditors of WFXL(TV).

6. In reply, Cantu essentially contended that it was impossible for Kelley/SGA to know how much money would be paid to creditors, including Brumlik. Cantu also contended that Brumlik's bankruptcy trustee did not demonstrate that Brumlik would not receive any distribution from the bankruptcy estate. Finally, Cantu submitted the declaration of an attorney who had performed services for Brumlik and who opined that funds from Brumlik's bankruptcy estate would be available for distribution to Brumlik personally.[2]

7. In the *MO&O*, we concluded that equitable considerations in favor of innocent creditors outweighed the likelihood that Brumlik would benefit to a significant extent. We determined that it was unlikely that Brumlik would receive a direct personal benefit from the sale of WFXL(TV) because of the circumstances of his personal bankruptcy. We also found that the amount of money likely to go to Brumlik's bankruptcy estate, $36,000, was *de minimis* in comparison with the amounts likely to go to innocent creditors of NewSouth. In any event, we observed that money going to Brumlik's bankruptcy estate could be used to pay the claims of Brumlik's creditors which included the United States. Consequently, we granted the Kelley/SGA assignment application.

II. PETITION FOR RECONSIDERATION

8. In the instant petition, Cantu insists that the grant of the Kelley/SGA application was repugnant to the *Second Thursday* policy. Cantu reaches this conclusion by claiming that $36,000 is not a *de minimis* benefit and that the benefit is direct in that it will go to Brumlik. Cantu submits that, without a waiver from Brumlik, the application is ungrantable because no direct benefit, however small, can be allowed. In support, Cantu cites *Mid-State Broadcasting Co.*, 61 FCC 2d 196 (1976), where, Cantu contends, the Commission denied a proposed sale predicated on the *Second Thursday* policy because the suspected wrongdoers would have received direct benefits of $30,799. Cantu concludes that because the state of Brumlik's bankruptcy is

[1] On July 6, 1994, Kelley/SGA filed "Comments" wherein they addressed an argument contained in Cantu's Reply. The "Comments" are unauthorized and will not be considered. *See* Section 1.106 of the Commission's Rules.

[2] Two supplemental pleadings clarified the extent of the claims of the United States against Brumlik.

unclear[3] and it is possible that Brumlik might ultimately receive some direct benefit from the proceeds of the sale of WFXL(TV), grant of the Kelley/SGA assignment application is premature.

9. In opposition, Kelley/SGA relate that after consummation of the sale on May 16, 1994, Kelley has distributed approximately $1,400,000 of the proceeds of the sale. Of the remaining $500,000 to be distributed, Kelley estimates that the costs of administration will total $200,000 and that $50,000 will go to the Internal Revenue Service. In addition, other priority claims total nearly $250,000. Thus, according to Kelley, only approximately $3,000 will be available for distribution to unsecured creditors, which include Brumlik's bankruptcy estate. Kelley concludes that any benefit to Brumlik would be minuscule and, in any event, would be payable to his bankruptcy estate for the benefit of innocent creditors and not to Brumlik personally.

10. In reply, Cantu contends that the focus of the Commission's *Second Thursday* policy is not on whether the suspected wrongdoer will receive a substantial or minor benefit but on whether the benefit is direct or indirect. Cantu submits that cases applying the *Second Thursday* policy make clear that the Commission will approve a sale only when the wrongdoers agree to forego all direct benefits. Cantu concludes that because questions remain as to whether Brumlik might ultimately receive a direct benefit, the Bureau erred in granting the application to assign the WFXL(TV) license from Kelley to SGA.

III. DISCUSSION

11. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted.

12. Essentially, Cantu claims that a material error occurred because the *MO&O* approved the WFXL(TV) sale even though Brumlik, the wrongdoer, might derive a direct benefit. According to Cantu, such a direct benefit was possible because as much as $36,000 from the sale of WFXL(TV) might ultimately have been paid to Brumlik's bankruptcy estate, and that sum, in turn, might be available for distribution to Brumlik himself upon termination of his bankruptcy proceeding. Cantu's interpretation of the *Second Thursday* policy is mistaken. The *Second Thursday* policy does not expressly limit approval of an assignment application only to those situations where the suspected wrongdoer will derive no direct benefit from the sale. Rather, the policy allows a sale to occur under circumstances where the wrongdoer "will derive no benefit from favorable action on the application *or* only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." *Second Thursday*, 22 FCC 2d at 516 (emphasis added). The *Second Thursday* determination rests on an "ad hoc balancing of the possible injury to regulatory authority that might flow from wrongdoers' realization of benefit against the public interest in innocent creditors' recovery from the sale and assignment of the license to a qualified party. [citations omitted]." *Mid-State Broadcasting Co.*, 61 FCC 2d at 197.

13. In balancing the possible injury to regulatory authority against the public interest in innocent creditors' recovery, the Commission has examined a wide variety of factors. *See, e.g., KOZN FM Stereo 99 Ltd.*, 5 FCC Rcd 2849 (1990); *Pyle Communications of Beaumont, Inc.*, 4 FCC Rcd 8625 (1989); *Norman Mesnikoff*, 49 RR 2d 643 (1981); *Davis Broadcasting Co.* , 67 FCC 2d 872 (1977); *Mid-State Broadcasting Co.*, 61 FCC 2d 196 (1976); *Shell Broadcasting, Inc.*, 38 FCC 2d 929 (1973). Among the factors considered have been the amount of money likely to go directly to suspected wrongdoers; the percentage of the total sales price likely to go directly to suspected wrongdoers; whether suspected wrongdoers are likely to receive a direct monetary benefit or only an indirect benefit such as a reduction of a liability; and whether suspected wrongdoers are in bankruptcy so that any money paid to them will be available to pay their creditors.

14. Although the Commission has refused to approve a sale where suspected wrongdoers are likely to receive a monetary payment (*e.g., Mid-State)*, the Commission has approved a sale where some of the proceeds might ultimately be paid to a suspected wrongdoer who, himself, is in bankruptcy. (*E.g., Pyle; Davis.*) In those latter cases, the Commission has determined that it served the public interest to approve the sale because not only would innocent creditors of the licensee receive compensation but innocent creditors of the accused wrongdoer would also receive some compensation. Plainly, that same conclusion is warranted here. Approval of the WFXL(TV) sale not only benefits the innocent creditors of NewSouth but, in the unlikely event that Brumlik's bankruptcy estate receives any of the proceeds, those proceeds will be available to pay Brumlik's creditors, none of whom has been implicated in the activities which led to Brumlik's conviction and incarceration. Conversely, there appears to be no public interest benefit in having Brumlik submit a waiver of all claims against NewSouth when the result of such a waiver would be a reduction in the amount of money available to pay creditors of Brumlik's bankruptcy estate. Accordingly, we are not persuaded that the public interest would be better served by disallowing the WFXL(TV) sale absent a statement from Brumlik that he would forego any possible benefit. At this point in time, imposition of such a requirement would simply hurt Brumlik's creditors. Cantu has advanced no sound reason why we should take such a course, and we decline to do so.

IV. ORDER

15. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed on May 31, 1994, by Manuel Cantu IS DENIED.

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[3] In this regard, Cantu submits a letter from the attorney representing the United States in the ongoing tax litigation concerning Brumlik. The attorney states that the claim of the United States against Brumlik is between $2,252,868.07 and $2,711,100.07. Cantu observes that the less the government seeks from Brumlik the more will be potentially available for distribution to him.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 12, 1995; Released: April 24, 1995

By the Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications [Upgrades] by Application*, 8 FCC Rcd 4735 (1993). The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

Community	Channel Deleted	Channel Added
Chinle, Arizona	297A	297C2
Coolidge, Arizona	280A	280C3
Window Rock, Arizona	274C1	274C3
Batesville, Arkansas	226C1	226C
Lindsay, California	277A	277B1
Twentynine Palms, California	239B1	239A
Marathon, Florida	249A	249C1
Gooding, Idaho	267A	265C
Maquoketa, Iowa	237A	236A
Stanford, Kentucky	240A	242C3
New Orleans, Louisiana	253C	253C1
Caribou, Maine	249A	249C3
Houlton, Maine	261A	261C3
Hurlock, Maryland	265A	263A
Blooming Prairie, Minnesota	265A	265C1
Glencoe, Minnesota	241C3	242C2
International Falls, Minnesota	281C2	281C3
Olivia, Minnesota	261A	261C3
Malta, Montana	261C3	261A
Superior, Nebraska	280C3	280A
Decatur, Texas	289C	289C1
Moab, Utah	244C3	246C1
Chesapeake, Virginia	229C	229C1
Chippewa Falls, Wisconsin	288A	289C3

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Sage Broadcasting Corporation — File No. BRCT - 930331KM

For Renewal of License for
Station KIDY(TV)
San Angelo, Texas

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 3, 1995; Released: April 24, 1995

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application filed for the above-referenced television station;[1] (ii) a Petition to Deny timely filed on July 1, 1993, by the League of United Latin American Citizens (LULAC) through its Texas State Conference against the renewal application of the station;[2] (iii) an opposition from the licensee; and (iv) the licensee's response to a staff letter of inquiry.[3]

II. BACKGROUND

2. LULAC alleges that KIDY(TV) violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, it requests that we conduct an investigation of the station's employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*). LULAC also requests that the Commission designate the renewal application for hearing and deny it. The licensee charges that LULAC has presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

III. PLEADINGS

3. *STANDING*. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline); Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

4. Submitted with the petition to deny was a declaration under penalty of perjury from the District V Director of LULAC, who claims to be a regular viewer of KIDY(TV). Accordingly, we hold that LULAC has petitioner status against Station KIDY(TV). *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *see also Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

5. *PRIMA FACIE CASE*. LULAC derived its factual allegations from the licensee's EEO program and annual employment reports. The licensee argues that in two respects LULAC failed to present a *prima facie* case. First, the licensee argues that LULAC's criticism of KIDY(TV) was based partly on its failure to employ minorities at full parity with their representation in the labor force even though the Commission's policy is to use 50% of parity as a guideline. Second, LULAC used 1990 Census data in its analysis and the licensee argues it should have used 1980 data, which reveal a lower minority percentage than 1990. Although the licensee is factually correct, review of the licensee's EEO records led us to conclude that LULAC presented a *prima facie* case against Station KIDY(TV) demonstrating that unconditional grant of the renewal application would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 (U.S.C. § 309(d)(1). *Astroline, supra*.[4] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual, supra.*

6. Our post-investigative review of LULAC's EEO allegations, as well as the licensee's renewal application, opposition and inquiry response, leads us now to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence of employment discrimination. Thus, grant of the renewal application will serve the public interest. 47 U.S.C. § 309(d)(2); *Astroline, supra.* However, we will grant renewal with appropriate remedies and sanctions for deficiencies in its minority recruitment efforts.

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[1] The license of KIDY(TV) expired on August 1, 1993.

[2] The Petition to Deny also included challenges against 15 other television stations in Texas. They will be addressed in separate Commission orders.

[3] On October 18, 1993, the licensee of KIDY(TV) filed an application to assign the license of the station (File No. BTCCT-931018KJ) from Raymond G. and Paris R. Schindler and Timothy R. Brown to Dane Patricia Schindler, Suzanne S. Brown, and Sherry S. Hawk. The application is currently pending.

[4] The licensee is reminded that under our EEO Rule, 47 C.F.R. § 73.2080, it has an affirmative obligation to recruit for females and minorities for each vacancy. To the extent that the licensee's recruitment efforts were inconsistent, female, as well as minority, employment was affected.

IV. DISCUSSION

7. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

8. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO); see also* 4 FCC Rcd 1715 (1989)(request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

9. Review of the licensee's opposition and inquiry response, as well as its renewal application, indicates that it filled 41 positions, including 35 upper-level job vacancies, from March 1, 1990, to August 1, 1993. The licensee's records reveal recruitment for 10 positions (six upper-level) and contacts with general sources as follows: the Texas Employment Commission (contacted for six openings), the Concho Valley Council of Governments (five openings), the *Abilene Reporter News* (two openings), the *Standard Times* (two openings), six other newspapers (one opening), and four colleges (one opening). For only one upper-level opening of the 10 subject positions, the licensee contacted three women's organizations and three minority organizations. For 14 other positions, the licensee recruited among its own employees only. Regarding the remaining 17 positions, the licensee knows that it failed to recruit for six, but incomplete records prevent it from knowing if it recruited for 11 positions. The licensee kept track of referrals, applicants, and interviewees for only one hire, which took place in the last five days of the license term. The only minority referral was from the Concho Valley Council of Governments. He was an Hispanic applicant hired for a lower-level position and was the only minority hired.[5]

10. LULAC charges that the licensee's renewal application reflects no EEO efforts, evidenced partly by an absence of minority recruitment sources. LULAC argues that a licensee may rely on general sources but only if they are productive. In this case, LULAC contends that the licensee used no sources that produced referrals for upper-level vacancies and also failed to recruit minorities for lower-level jobs. Using 1990 Census data, LULAC argues that minorities comprise 29.0% of the labor force and that the station is in an area with an "easy availability of minorities." LULAC then criticizes the licensee for hiring only one minority, which it argues is "far below" minority representation in the labor force and "is inconsistent with affirmative progress toward workforce parity." In addition, LULAC contends that from 1989 to 1992, the station's upper-level staff declined by six, four of whom were minorities. LULAC alleges that this raises the question of whether minorities were singled out for removal and asserts that the licensee "apparently engaged in systematic discrimination."

11. In response, the licensee argues that it did engage in EEO efforts. It claims that some of its general sources such as the Texas Employment Commission "consistently produced minority referrals."[6] The licensee also claims that its minority sources were "unresponsive" and that it added new minority sources five months before the license expired to try to improve its recruitment. In addition, the licensee claims that it recruited for more positions than its records indicate. It explains that its records are incomplete because of space limitations and because it mistakenly believed it did not need to keep the records "in light of its adequate EEO performance." The licensee claims that in May 1993 it started keeping complete information on recruitment, as reflected with the July 26, 1993, hire. In addition, the licensee admits that it did not recruit in some cases because it needed to hire someone in an emergency and also because it receives some unsolicited applications. Nevertheless, the licensee claims it "has substantially improved its record" of recruiting minorities when it receives "unsolicited" applications. The record, however, does not show how the licensee recruits minorities when the station receives an unsolicited application.

12. The licensee argues correctly that LULAC is mistaken in applying 1990 Census data to its license term and that 1980 data should be used. Although it hired only one minority, the licensee notes that it employed minorities, and Hispanics specifically, above or near 50% of parity in full-time overall positions every year of the license term and in three of five years in upper-level positions. Regarding terminations, the licensee states that LULAC's argument that the station's upper-level staff declined by six, including four minorities, is incorrect. It maintains that its staff was cut back in 1989 because of elimination of the news department and other jobs. Specifically, it contends

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[5] KIDY(TV) is located in the San Angelo, Texas MSA, whose labor force is 45% female and 24.1% minority (3.6% Black, 19.6% Hispanic, .5% Asian/Pacific Islander, and .4% American Indian). The licensee's 1989 Annual Employment Report indicated an overall staff of 31 employees (26 upper-level). Six Hispanics (19.4%) were employed overall, with five (19.2%) in upper-level positions. In 1990, there were 29 employees overall with 24 on the upper-level staff. Four Hispanics (13.8%) were employed on both staffs (16.7% of upper-level positions). In 1991, the overall staff decreased to 25 employees and the upper-level staff decreased to 19 employees. Three Hispanics (12%) were employed overall, with one (5.3%) in an upper-level position. The full-time staff in 1992 increased to 27 persons, including 20 in upper-level positions. Three Hispanics (11.1%) were employed overall, with one (5%) in an upper-level position. In 1993, the station employed 28 persons overall with 23 in upper-level positions. It employed three Hispanics (10.7%) and one Black (3.6%) overall and two Hispanics (8.7%) and the Black employee (4.4%) in upper-level positions.

[6] The licensee's response to our inquiry, however, revealed only one minority referral for a full-time position -- the one Hispanic hired.

that it terminated 83 employees between January 1, 1989, and December 31, 1992, from various positions, at least 58 upper-level. Of the 83, nine were minorities. Of all terminations, 69 were voluntary, six were due to layoffs, and eight were involuntary. Of minority terminations, five were voluntary, two were layoffs, and two were involuntary.[7] The licensee denies that it discriminated against any employees and notes that its highest paid employee is a female Hispanic marketing manager and that minorities own 4% of its stock.

13. Finally, the licensee argues that it has difficulty recruiting or retaining applicants of any race because it is in the 188th ranked market, it can pay only relatively low wages, and it is perceived as a "training ground" where employees get started in their careers and then leave.

14. Based on the foregoing, we find no substantial and material questions of fact to warrant designation for hearing. *See Astroline, supra.* Further, because the licensee employed minorities in every year of the license term, we find no evidence of employment discrimination. Thus, grant of the station's renewal is in the public interest.

15. However, we find KIDY(TV)'s EEO efforts deficient because it can only document that it had recruited outside the station for 10 of the 41 vacancies, obtained only one minority applicant for only one lower-level position, and failed to maintain adequate records for meaningful self-assessment. 47 C.F.R. § 73.2080.

16. Earlier this year, we adopted a Policy Statement regarding forfeitures to be assessed for violations of our EEO Rule. *Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules,* 9 FCC Rcd 929 (1994) ("EEO Policy Statement"). A court decision issued since the EEO Policy Statement indicated that our general policy statement on forfeitures[8] must be put out for notice and comment. *United States Telephone Ass'n v. FCC,* 28 F.3d 1232 (D.C. Cir. 1994) (*USTA*). While the *USTA* case did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the EEO Policy Statement until it is likewise made available to the public for notice and comment. *See, e.g., Petition for Declaratory Ruling by Eagle Radio, Inc.* (filed August 11, 1994); *Letter from Henry L. Baumann to William E. Kennard,* July 13, 1994. We will respond to these concerns in a separate order, and in the meantime, utilize our pre-January 1994 process of assessing forfeitures.

17. Previously, we used a process of *stare decisis.* We would analogize the cases based on factors such as, but not limited to, station size, number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment, and record-keeping. Under this approach, in determining appropriate sanctions and/or remedies, we have carefully considered the facts and circumstances of this case in light of pertinent case precedent. We believe that the record in the instant case is similar to, but less egregious than, that of the licensee of KRMD(AM)/KRMD-FM, Shreveport, Louisiana, in *Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana,* 7 FCC Rcd 1503 (1992) (*KRMD*).[9] *KRMD,* although issued in 1992, was decided based on a former forfeiture authority, which was significantly lower, as discussed in the following paragraph. The licensee of KRMD(AM)/KRMD-FM claimed that it contacted one minority source for openings (but could not document any such contacts for specific openings), received only three minority referrals, and hired no minorities among its 34 full-time hires (33 upper-level) during the review period. Furthermore, although it employed two to three Blacks each year of the license term, all had been hired by the stations' previous licensee. In *KRMD,* we concluded that the licensee failed to comply with our EEO Rule and renewed the license for a short term, issued a Notice of Apparent Liability for $20,000, and imposed reporting conditions.

18. Previously, the forfeiture penalty assessed against a broadcaster could "not exceed $2,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation could not exceed a total of $20,000." In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 101-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act." However, even before our forfeiture authority was expanded in 1989, we assessed substantial fines for EEO recruitment deficiencies. *See e.g., Kansas City Youth for Christ,* 3 FCC Rcd 6866 (1988) (licensee received $10,000 forfeiture, short-term renewal, and reporting conditions for failure to self-assess and make any efforts to recruit women or minorities); *Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina,* 5 FCC Rcd 1704 (1990) (licensee received $10,000 forfeiture, short-term renewal, and reporting conditions where it failed to hire minorities for upper-level positions in a 6 year period, and did not use recruitment sources which generated minority referrals); *Commission's Letter to John P. Healy, Treasure Coast Radio, Inc.,* 5 FCC Rcd 3745 (1990) (licensee received $10,000 forfeiture and reporting conditions where its recruitment efforts attracted no minority candidates in a labor market with a 12.5% Black labor force, and its records did not show any contacts with minority organizations or hires during a two-year period).

19. The record here indicates that the licensee of KIDY(TV) can document recruitment for only 10 of 41 openings and can document that minorities were present in only one applicant and interview pool. In addition, the licensee's records indicate that it failed to contact minority sources for all but one opening. Furthermore, the licensee failed to maintain adequate records for meaningful self-assessment. In this regard, we note that it kept applicant and interview records for only one opening.

20. We believe that the facts in the instant case are similar to, but less egregious than, those of *KRMD.* Although the licensee of KIDY(TV) hired and employed

[7] The minorities were terminated for the following reasons: Voluntary - medical reasons, took another job, joined military, moved to California, and "no reason" given. Involuntary - failed to show up for work when scheduled, failed to learn job requirements. The two layoffs resulted from elimination of the news department and a payroll cut.

[8] *Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *revised,* 8 FCC Rcd 6215 (1993).

[9] The Shreveport, Louisiana MSA, in which the stations are located, has a 30.6% minority labor force (28.6% Black, 1.4% Hispanic).

more minorities and is located in slightly smaller minority labor force, it is otherwise very similar to the record in *KRMD*. Given the facts of this case, broadcasters' familiarity with our long-standing EEO Rule, as well as our expanded forfeiture authority in this area, we believe that a forfeiture of $25,000 and renewal for a short term are appropriate sanctions for violations of the Commission's EEO Rule in this case. Thus, we will grant the renewal application of KIDY(TV) for a short term, subject to reporting conditions and a Notice of Apparent Liability for $25,000.

21. In view of the assignment application pending for KIDY(TV), we note that upon consummation of the assignment, the reporting conditions, as well as the short term of the license, will pass to the new licensee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989); *Applications of Beacon Broadcasting Corporation For Renewal of Licenses of Station WBNR(AM), Beacon, New York, and Station WSPK(FM), Poughkeepsie, New York*, 9 FCC Rcd 2132 (1994).

V. CONCLUSION

22. Upon review of the record, we find that grant of the renewal application, although subject to sanctions, is justified. We will renew the license of Station KIDY(TV) for a short term subject to reporting conditions and a Notice of Apparent Liability for $25,000.

VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that the Petition to Deny filed by the League of United Latin American Citizens through its Texas State Conference against the renewal application of KIDY(TV) IS DENIED.

24. IT IS FURTHER ORDERED that the license renewal application for KIDY(TV) IS GRANTED FOR A SHORT TERM ending August 1, 1996, subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $25,000.

25. IT IS FURTHER ORDERED that the licensee of Station KIDY(TV) submit to the Commission an original and one copy of the following information on April 1, 1996:

(a) For the report, please make two lists divided by full- time and part-time job vacancies during the twelve months preceding the reporting date, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[10]

(b) A list of all employees as of the March 1, 1996, payroll period by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

26. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

27. The report is to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

28. Should the parties have any questions regarding this action or require further information concerning employment reports, they may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee of KIDY(TV) may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Order. Any comments concerning its ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[10] Such a list might start:

1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (01/19/96)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

EDUCATIONAL MEDIA FOUNDATION, INC. File No. BPED-901003MG

To Modify the Facilities of
Noncommercial Educational FM Station
KLVR, Santa Rosa, California

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1995; Released: April 24, 1995

By the Commission:

1. The Commission has under consideration an application for review filed on July 2, 1992, by San Francisco United School District ("School District"), licensee of noncommercial educational FM station KALW San Francisco, California. School District seeks reexamination of the May 28, 1992, letter from the Mass Media Bureau ("Bureau")[1] granting the modification application of Educational Media Foundation, Inc. ("Educational Media"), licensee of noncommercial educational FM station KLVR, Santa Rosa, California and denying School District's petition to dismiss ("petition") that application.[2] We deny the application for review for the reasons set forth below.

BACKGROUND

2. *Modification Application/Deficiency Letter.* On October 3, 1990, Educational Media submitted its application (BPED-901003MG) for minor modification of KLVR(FM)'s facilities. On February 14, 1991, the Bureau staff advised Educational Media in a deficiency letter that the proposed effective radiated power ("ERP") and antenna height above average terrain ("HAAT") combination proposed in the application exceeded the maximum standards for Class B facilities in violation of 47 C.F.R. Section 73.211 of the Rules.[3] The letter also indicated that the proposal did not meet the spacing requirements of 47 C.F.R. Section 73.207 with respect to KKIS(FM) at Walnut Creek, California[4] and that, although Educational Media had requested processing pursuant to the contour protection provisions of 47 C.F.R. Section 73.215, it had failed to make proper calculations under that rule. Finally, the letter indicated that the radiofrequency ("RF") radiation study submitted by Educational Media as part of its environmental assessment was deficient. The letter afforded Educational Media an opportunity to file a curative amendment to correct the deficiencies and, in response, Educational Media timely filed an amendment on March 15, 1991 (BPED-901003MG). Two additional amendments were filed by Educational Media. The first, filed on May 6, 1991 corrected a typographical error in the response to question seven of the engineering section of the March 15, 1991 amendment.[5] The second, filed on August 2, 1991, responded to an oral inquiry by the Bureau staff to provide engineering information omitted from the March 15, 1991 amendment. School District filed its petition opposing Educational Media's application on March 27, 1992. As noted, the Bureau denied the petition on May 28, 1992.

3. *Application for Review.* School District's July 2, 1992 application for review essentially repeats the arguments made in its petition. Specifically, School District asserts that Educational Media's original application should have been returned as unacceptable for filing pursuant to the *Commission Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications,* 56 RR 2d 776 (1984), *recon. denied* 57 RR 2d 1603 (1985) ("1984 Policy Statement"). The 1984 Policy Statement provides that applications which are returned as unacceptable for filing will have one opportunity to be resubmitted and accepted *nunc pro tunc.* Under this standard, School District claims that Commission staff erred in accepting two amendments to Educational Media's application which were filed subsequent to the March 15, 1991 amendment -- Educational Media's "one opportunity" to correct all deficiencies.

DISCUSSION

4. As School District correctly points out, the 1984 Policy Statement establishes certain criteria which, if not met, result in an application being returned as unacceptable for filing. Among these requirements are compliance with maximum power and height limitations and distance separation standards. Although the staff's determinations that Educational Media's application was acceptable despite the Section 73.211 violation (concerning maximum power and height) and the Section 73.215 violation (concerning distance separations) may therefore appear to conflict with the 1984 Policy Statement, those determinations were in fact consistent with subsequent Commission cases. We therefore agree with the Bureau's May 28, 1992 decision that the staff acted correctly in granting Educational Media's modification application instead of dismissing the application as unacceptable for filing.

5. Specifically, the staff determined that the Section 73.211 violation was not an acceptability defect because it was "attributable to the imprecision inherent in manually ascertaining [maximum permissible ERP] from the Com-

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[1] *Letter from Larry D. Eads,* reference 8920-ALM, (Chief Audio Services Division, May 28, 1992).

[2] Educational Media filed an opposition to the application for review on July 20, 1992.

[3] *Letter from Dennis Williams,* reference 8920-AJA, (Chief, FM Branch, February 14, 1991).

[4] KLVR operates as a noncommercial educational FM station on Channel 220, the upper limit of the reserved FM band. KKIS operates commercially on Channel 221. KLVR must protect KKIS in accordance with the spacing and protection rules governing commercial stations. It is not, however, subject to the hard-look processing rules. *See* paragraph 6 *infra.*

[5] Educational Media incorrectly gave the height of the center of radiation in the horizontal plane as 991 meters. On the line immediately below that figure, the height above average terrain was given for the vertical plane as 911 meters. The 911 meters figure, which is the correct calculation, was also provided in the engineering statement accompanying the amendment.

mission's propagation curves . . . ."[6] This determination was clearly consistent with *Special Markets Media, Inc.*, 4 FCC Rcd 5753, 5754 (1989). In that case we noted that the Bureau had correctly permitted an FM commercial applicant to amend rather than finding its deficiency an acceptability defect and dismissing the application under FM hard-look processing guidelines.[7] Although the applicant had failed to comply with Section 73.211, his failure was due to the "imprecision" in using the propagation curves to manually calculate maximum ERP. Likewise, the staff's determination that Educational Media's Section 73.215 violation was not an acceptability defect was consistent with our case decisions. *See Rochelle C. Salzer v. FCC, 778 F.2d 869 (D.C. Cir. 1985); Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 298 (D.C. Cir. 1968). In *Radio Lompoc Limited Partnership*, 7 FCC Rcd 3798 (1992), we found that the Bureau had correctly permitted two applicants to amend rather than dismissing their applications under the FM hard-look processing standards because their deficiencies related to Section 73.215 showings and "the wording of Section 73.215 . . . . does not afford applicants full and explicit notice of certain technical requirements necessary to avoid dismissal . . . ." *Id.* at 3800. Here, Educational Media's failure to comply with Section 73.215 was attributable to the same difficulty in applying that Section as noted in *Radio Lompo c.* As in *Radio Lompoc*, the staff properly allowed the applicant to amend its application to correct the violation. In regard to the deficiencies in Educational Media's environmental assessment, we note that an environmental study is not a part of the technical acceptance criteria requirements in the 1984 Policy Statement and therefore a flawed assessment does not require dismissal of the application as unacceptable for filing.

6. We also agree that the staff properly considered the two amendments submitted subsequent to the March 15, 1991 amendment. Since the staff correctly decided that Educational Media's original application did not have to be returned as "unacceptable for filing" pursuant to the 1984 Policy Statement, the provision of the Policy Statement limiting an applicant to only one opportunity to amend is, contrary to School District's arguments, inapplicable. Further, School District is misguided in arguing that the staff should have returned the application on the basis of the *Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete Or Are Otherwise Defective*, 58 RR 2d 166, 168 (1985) ("Hard Look Policy Statement"). Noncommercial educational FM applications, such as KLVR, are not subject to the "hard look" approach. *Report and Order to Modify Processing Procedures for Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992).

7. Finally, School District maintains that Educational Media placed "an inordinate burden on our processing staff due to the defects and omissions contained in the application." However, in the context of noncommercial application processing, Educational Media's omissions and errors were relatively minor and were not "incomplete or patently defective." The 1984 Policy Statement asserts that in some situations, an applicant may fail to answer a question or include an exhibit clearly called for in the application and that many of these instances can be attributed to clerical error or oversight. Despite School District's claim to the contrary, the two additional amendments filed by Educational Media did not impose an inordinate burden on the processing staff. As noted earlier, one of the two amendments was filed in response to an oral inquiry by Commission staff, and the other simply corrected a typographical error in one entry concerning antenna height that was correctly described in other parts of the application. *See* n.5, *supra.*

CONCLUSION

ACCORDINGLY, IT IS ORDERED, that the application for review filed on July 2, 1992, by San Francisco United School District IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] *Letter from Larry D. Eads, supra*, at page 3.
[7] Under the hard-look processing standards for FM commercial stations, if an application contained an acceptability defect it was dismissed with no opportunity to amend.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-141

In the Matter of

Amendment of Section 73.202(b)	RM-8544
Table of Allotments,	
FM Broadcast Stations.	
(Dell Rapids, South Dakota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 12, 1995; Released: April 24, 1995

By the Chief, Allocations Branch:

1. At the request of Conway Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 7292 (1994), proposing the allotment of Channel 239C3 at Dell Rapids, South Dakota, as the community's first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.[1]

2. We believe the public interest would be served by allotting Channel 239C3 at Dell Rapids, South Dakota, since it would provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 239C3 can be allotted at Dell Rapids in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.1 kilometers (1.9 miles) southwest.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 8, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Dell Rapids, South Dakota	239C3

4. The window period for filing applications will open on **June 8, 1995**, and close on **July 10, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In conformance with the Commission's general policy of accepting late-filed comments where the proceeding is uncontested, we have accepted petitioner's comments for the purpose of allowing petitioner to reaffirm its interest in applying for Channel 239C3 at Dell Rapids. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988).

[2] The coordinates for Channel 239C3 at Dell Rapids are North Latitude 43-47-57 and West Longitude 96-43-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-1

In the Matter of

Amendment of Section 73.202(b),	RM-8527
Table of Allotments,	
FM Broadcast Stations.	
(Hamilton, Montana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1995; Released: April 24, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 569 (1995), proposing the allotment of Channel 251C3 to Hamilton, Montana, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Benedict Communications, Inc. ("petitioner"). Petitioner filed comments in support of the allotment of Channel 251C3 at Hamilton and stated its intention to file an application for the channel, if allotted. Bitterroot Valley Broadcasting, Inc. ("Bitterroot") filed comments indicating its intention to file an application for a channel at Hamilton.

2. In response to the *Notice*, petitioner states that although it is the licensee of Stations KLYQ(AM) and KBMG(FM) in Hamilton, it is eligible to acquire a second FM station in the community. Petitioner's engineering statement indicates that the principal city contours for four commercial facilities and one non-commercial facility overlap the principal city contour of Station KBMG(FM). Petitioner contends that since Station KBMG(FM) and proposed Channel 251C3 represent less than fifty percent of the FM stations in the market, it would be eligible to acquire the proposed FM channel pursuant to Section 73.3555(a)(1)(i) of the Commission's Rules.[1]

3. We believe the public interest would be served by allotting Channel 251C3 to Hamilton, Montana, in order to provide the community with an additional FM broadcast service. As indicated in the *Notice*, Channel 251C3 can be allotted to Hamilton, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[2] Since Hamilton is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 8, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Hamilton, Montana	240C3, 251C3

5. The window period for filing applications for Channel 251C3 at Hamilton will open on **June 8, 1995**, and close on **July 10, 1995**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] *See Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (1992). For stations in markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. We note that although petitioner made a showing of eligibility in response to the *Notice*, the analysis made at the application stage will determine compliance with the multiple ownership rules.

[2] The coordinates for Channel 251C3 at Hamilton are 46-14-36 and 114-09-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-79

In the Matter of

Amendment of Section 73.202(b),	RM-8493
Table of Allotments,	
FM Broadcast Stations.	
(Pine Hill, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 14, 1995; Released: April 24, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 3273 (1994), issued in response to a petition filed by R. J. Miller ("petitioner") proposing the allotment of Channel 244A to Pine Hill, Alabama, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 244A to Pine Hill, Alabama, since it could provide a first local aural transmission service to the community.

Engineering Analysis

3. As indicated in the *Notice*, Channel 244A can be allotted to Pine Hill consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 6.2 kilometers (3.9 miles) northwest of the community at coordinates North Latitude 32-01-38 and West Longitude 87-37-23. The site restriction is necessary to avoid a short-spacing to the authorized site of Station WJUS(FM), Channel 243C, Fort Walton Beach, Florida, at coordinates North Latitude 30-45-04 and West Longitude 86-42-38.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 8, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Pine Hill, Alabama, as follows:

City	Channel No.
Pine Hill, Alabama	244A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 244A at Pine Hill, Alabama, will open on **June 8, 1995** and close on **July 10, 1995**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 244A at Pine Hill, Alabama, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner also requests that as the initiating proponent to provide a first local aural transmission service to Pine Hill, Alabama, that he be awarded a preference at the application level, should Channel 244A be allotted to the community, as requested. Although a proposal is before the Commission to provide a "finder's preference" to petitioners that have taken the initiative and burden of introducing new service to a community, no final action has been taken on the request. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings* (GC Docket No. 92-52), 7 FCC Rcd 2664 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-48

In the Matter of

Amendment of Section 73.606(b), RM-8590
Table of Allotments,
TV Broadcast Stations.
(Weaverville, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 14, 1995; Released: April 24, 1995

Comment Date: June 15, 1995
Reply Comment Date: June 30, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by Mark C. Allen ("petitioner") seeking the allotment of UHF television Channel 32 to Weaverville, California, as that community's first local television broadcast service. Petitioner stated his intention to apply for authority to construct and operate a television broadcast station on Channel 32, if allotted to Weaverville, as requested.

2. Weaverville (population 3,370),[1] in Trinity County (population 13,063), is located approximately 269 kilometers (167 miles) northwest of Sacramento, California.

3. On July 16, 1987, the Commission instituted a temporary freeze on the filing of petitions for rule making to amend the Television Table of Allotments for certain metropolitan areas. *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987 ("freeze *Order*"). Weaverville is located within the prohibited cochannel distance separation of 174.5 miles (280.8 kilometers) from the Sacramento-Stockton, California, television market, one of the major market communities affected by the freeze *Order*. Therefore, the proposal requires a site restriction to conform with the terms of the freeze *Order*. Petitioner acknowledges the effect of the freeze on his proposal, and has suggested a transmitter site located beyond the affected area. Accordingly, a staff review of the proposal has determined that Channel 32 can be allotted to Weaverville consistent with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules at the petitioner's suggested site on Granite Peak Mountain, located 20.7 kilometers (12.9 miles) north of the community at coordinates 40-54-45 and 122-52-15.

4. As petitioner's proposal to allot UHF television Channel 32 to Weaverville would provide a first local television service to that community, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Weaverville, California	--	32

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 15, 1995**, and reply comments on or before **June 30, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Mark C. Allen
3745 McHale Way
Redding, CA 96001

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Population figures are from the 1990 U.S. Census.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Multimedia Cablevision, Inc.	CUID Nos. IL0537, IL0538, IL0838,
Order Dismissing Complaints	IL1123, IL1303, IL1304, IL1420

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 20, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Multimedia Cablevision, Inc. ("Multimedia") was charging for its cable programming service ("CPS") tiers in numerous communities in Illinois (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Multimedia offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Multimedia responded to the complaints by stating that it has no CPS tier in those systems. On March 3, 1995, Multimedia submitted information supporting its claim that CPS tiers subject to rate regulation did not exist as of September 1, 1993 and still do not exist in any of the subject communities in response to a letter from the Commission staff.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. BACKGROUND

4. The Cable Services Bureau has addressed the regulatory status of packages of channels offered on an a la carte basis in several orders resolving letters of inquiry ("LOIs") directed to cable operators. Of particular relevance to this case, the Cable Services Bureau has released orders resolving LOIs regarding Century Cable TV's ("Century") systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[11] Relying on the Commission's *Going Forward Order*,[12] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings did not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

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[1] Letter from Zenji Nakazawa, FCC, to David P. Fleming, Vice President and General Counsel, Multimedia Cablevision, Inc. (February 7, 1995).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358, 10 FCC Rcd 115 (Cab. Serv. Bur. 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354, 10 FCC Rcd 99 (Cab. Serv. Bur. 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361, 10 FCC Rcd 127 (Cab. Serv. Bur. 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360, 10 FCC Rcd 123 (Cab. Serv. Bur. 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur., released Dec. 12, 1994).

[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

5. Since the LOI orders found that the elimination of Century's CPS tiers did not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as new product tiers, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[13]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Multimedia for each of the subject communities indicate that Multimedia restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that Century did for the seven areas mentioned above where LOI orders have been issued. Multimedia discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for five channels which it moved from the basic service tier into an eight channel a la carte package.[14] The remaining three channels in the a la carte package were not previously offered on either Multimedia's basic service tier or its cable programming services tier.[15]

7. We feel that we have sufficient information regarding Multimedia's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Multimedia's CPS tiers, the small number of channels that were removed from rate-regulated tiers and offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Multimedia to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Multimedia in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Multimedia's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[16]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Multimedia Cablevision, Inc. in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Multimedia Cablevision, Inc. in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[13] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur., released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur., released Dec. 20, 1994).

[14] In the subject communities, the five channels which were removed from the basic service tier are Turner Network Television (TNT), Cable News Network (CNN), CNHN, The Discovery Channel (TDC), and Turner Network News (TNN).

[15] In the subject communities, the three channels which comprise the a la carte packages but which were not formerly offered on a rate-regulated tier are Cartoon, The Learning Channel (TLC), and ESPN2.

[16] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
IL0537	Batavia	19	24	38	0	8
IL0538	Lisle	19	22	38	0	8
IL0838	Alsip	18	24	38	0	8
IL1123	Cook County	18	22	38	0	8
IL1303	North Barrington	12	21	30	0	8
IL1304	Inverness	12	21	30	0	8
IL1420	Barrington Hills	12	21	30	0	8

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Multimedia Cablevision, Inc. CUID Nos. IN0091, IN0220

Order Dismissing Complaints

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 20, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Multimedia Cablevision, Inc. ("Multimedia") was charging for its cable programming service ("CPS") tiers in two communities in Indiana (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Multimedia offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Multimedia responded to the complaints by stating that it has no CPS tier in those systems. On March 3, 1995, Multimedia submitted information supporting its claim that CPS tiers subject to rate regulation did not exist as of September 1, 1993 and still do not exist in any of the subject communities in response to a letter from the Commission staff.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. BACKGROUND

4. The Cable Services Bureau has addressed the regulatory status of packages of channels offered on an a la carte basis in several orders resolving letters of inquiry ("LOIs") directed to cable operators. Of particular relevance to this case, the Cable Services Bureau has released orders resolving LOIs regarding Century Cable TV's ("Century") systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[11] Relying on the Commission's *Going Forward Order*,[12] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings did not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

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[1] Letter from Zenji Nakazawa, FCC, to David P. Fleming, Vice President and General Counsel, Multimedia Cablevision, Inc. (February 7, 1995).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358, 10 FCC Rcd 115 (Cab. Serv. Bur. 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354, 10 FCC Rcd 99 (Cab. Serv. Bur. 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361, 10 FCC Rcd 127 (Cab. Serv. Bur. 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360, 10 FCC Rcd 123 (Cab. Serv. Bur. 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur., released Dec. 12, 1994).

[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

5. Since the LOI orders found that the elimination of Century's CPS tiers did not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as new product tiers, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[13]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Multimedia for each of the subject communities indicate that Multimedia restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that Century did for the seven areas mentioned above where LOI orders have been issued. Multimedia discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for five channels which it moved from the basic service tier into an eight channel a la carte package.[14] The remaining three channels in the a la carte package were not previously offered on either Multimedia's basic service tier or its cable programming services tier.[15]

7. We feel that we have sufficient information regarding Multimedia's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Multimedia's CPS tiers, the small number of channels that were removed from rate-regulated tiers and offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Multimedia to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Multimedia in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Multimedia's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[16]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Multimedia Cablevision, Inc. in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Multimedia Cablevision, Inc. in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[13] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur., released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur., released Dec. 20, 1994).

[14] In the subject communities, the five channels which were removed from the basic service tier are Turner Network Television (TNT), Cable News Network (CNN), CNHN, The Discovery Channel (TDC), and Turner Network News (TNN).

[15] In the subject communities, the three channels which comprise the a la carte packages but which were not formerly offered on a rate-regulated tier are Cartoon, The Learning Channel (TLC), and ESPN2.

[16] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
IN0091	Valparaiso	14	18	27	0	8
IN0220	Valparaiso	14	18	27	0	8

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-40

In the Matter of

Allocation of the 219-220 MHz Band for Use by the Amateur Radio Service — RM-7747

REPORT AND ORDER

Adopted: March 14, 1995; Released: March 17, 1995

By the Commission:

I. INTRODUCTION

1. By this action, the Commission allocates the 219-220 MHz band to the amateur radio service on a secondary basis for point-to-point fixed digital message forwarding systems,[1] including intercity packet backbone networks. This allocation will alleviate congestion that amateurs are experiencing in certain areas of the country in the 222-225 MHz band and will facilitate establishment of regional and nationwide networks for amateur digital packet communications. The regulatory plan we are adopting will also ensure that use of this band by amateurs does not interfere with other users of this and adjacent bands.

II. BACKGROUND

2. This proceeding was initiated in response to a Petition for Rule Making (RM-7747) filed by the American Radio Relay League (ARRL). In its petition, ARRL requested that the Commission permit secondary amateur use of the 216-220 MHz band for wideband digital packet backbone networks. ARRL stated that this allocation was needed to alleviate congestion in the 222-225 MHz band and to permit the development of new regional and nationwide packet networks.

3. The 216-218 and 219-220 MHz bands currently are allocated on a primary basis to the maritime mobile service for Automated Maritime Telecommunications Systems (AMTS).[2] The 218-219 MHz band is allocated on a primary basis to Interactive Video and Data Services (IVDS).[3] In addition, frequencies within the 216-220 MHz band are allocated on a secondary basis to wildlife telemetry,[4] fixed and land mobile services, and aeronautical mobile services.[5] Television broadcast channel 13 operations occupy the adjacent 210-216 MHz band.

4. Packet radio systems transmit digital data in groups or "packets" using a specified format. Radio channels used by these systems are occupied only during the time individual "packets" of data are actually being transmitted. Upon completion of a transmission the channel becomes available for other traffic. Amateurs use packet radio for transmitting a variety of material, including messages, computer programs, graphic images and data bases. These systems can be used in times of emergency to efficiently carry a large volume of messages when other communications facilities are out-of-service or overloaded. Amateur radio operators use special wideband packet radio networks to provide intercity links for their packet radio systems. Amateurs are permitted to send data, radio teletype, and analog signals, including all types of packet communications in the 222-225 MHz band. The packet message forwarding systems are point-to-point fixed systems and are permitted in the 222-225 MHz band and on higher frequency bands.

5. On February 26, 1993, a *Notice of Proposed Rule Making* (*Notice*) was adopted in this proceeding. In the *Notice*, we tentatively concluded that there is a need for some additional spectrum for wideband digital packet backbone networks.[6] However, we were also concerned that amateur use of the 216-219 MHz portion of this band could result in harmful interference to primary services on and adjacent to those frequencies. Therefore, we proposed to allocate the 219-220 MHz band for secondary amateur use, and we proposed rules to prevent such amateur operations from interfering with the existing primary services.[7] Twenty-one parties submitted eighteen comments and five replies in response to the *Notice*.[8]

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[1] In the *Notice of Proposed Rule Making* (*Notice*), we proposed to use the 219-220 MHz spectrum for amateur auxiliary station (point-to-point) packet backbone networks and other amateur point-to-point fixed communications. At the time of the *Notice*, the operation of such networks fell within the scope of operations covered by the definition for auxiliary stations. Last year, in order to clarify the meaning of the term "message forwarding system" we added a definition of this term in Section 97.3 of the Rules. The operation of intercity packet networks falls within the definition for "message forwarding systems." *See Report and Order*, PR Docket No. 93-85, 9 FCC Rcd 1786 (1994). We are using this new definition herein.

[2] AMTS has a primary allocation in the 216-218 MHz and 219-220 MHz bands with AMTS group A and B coast stations at 217-218 MHz and AMTS group A and B ship stations at 219-220 MHz. Group C and D coast station frequencies in the 216-217 MHz band are currently not assignable. See 47 C.F.R. §§ 2.106, 80.385(a)(2).

[3] *See* 47 C.F.R. §§ 2.106, 95.801 *et seq.*

[4] This secondary allocation authorizes tracking of, and telemetering of scientific data from, ocean buoys and wildlife.

[5] Radiolocation was reduced to secondary status as of January 1, 1990, *see* International Footnote 627 to the Table of Frequency Allocations, 47 C.F.R. § 2.106. Additionally, note US229 states that stations in the fixed and mobile services are prohibited from causing interference to the U.S. Navy's SPASUR system.

[6] *See Notice of Proposed Rule Making*, ET Docket No. 93-40, 8 FCC Rcd 2352 (1993).

[7] At the time of the *Notice*, ProNet, Inc. (ProNet) had petitioned the Commission for a secondary allocation for electronic tracking services in the 216-220 MHz band. Subsequently, ProNet modified its petition to request an allocation in the 216-217 MHz band. The Commission is considering whether to reallocate 216-217 MHz band in PR Docket No. 92-257.

[8] Appendix C lists the commenting parties.

III. DISCUSSION

6. Historically, the amateur service has contributed to the development of radio technology and fulfilled important communications requirements during times of emergency. We believe it is important to assist and encourage amateur radio operators in continuing these efforts. As discussed below, we therefore are allocating, on a secondary basis, the 219-220 MHz band for point-to-point fixed digital message forwarding systems.[9] This additional spectrum for amateur operations will serve the public interest by: 1) relieving congestion that exists in the 222-225 MHz band in certain geographic areas; 2) encouraging the development and implementation of a regional and/or nationwide digital message forwarding system network that can be used for emergency and national defense communications purposes; 3) facilitating connection of local packet nodes to form such regional and nationwide networks; and, 4) providing spectrum for exploration of new technology related to these purposes.

Spectrum Allocation.

7. In the *Notice*, we observed that the 222-225 MHz amateur band appears to be significantly congested in certain areas, and that this congestion appears to limit the ability of the amateur community to interconnect existing amateur packet networks. We therefore proposed to allocate the 219-220 MHz band on a secondary basis for amateur auxiliary station packet backbone networks and other amateur point-to-point fixed communications. We also proposed rules to prevent amateur operations from causing interference to primary operations in and adjacent to this band. We sought comment on whether amateur use of this band should be limited to digital data communications or to any digital communications, including digitized voice, or whether any modulation or access method should be permitted so long as the operation is for point-to-point fixed communications.

8. *Comments*. The majority of the commenting parties support our initial assessment of the need to allocate additional spectrum for the amateur services. Most of these parties agree that the 219-220 MHz band can be used for development of amateur point-to-point fixed digital message forwarding systems without obstructing the operation of existing services.[10] For example, ARRL states that the *Notice* represents a reasonable attempt to alleviate the frequency congestion in the 222-225 MHz amateur band.[11] Waterway Communications System, Inc. (Watercom), an AMTS provider, supports the allocation provided that the priority status of the primary AMTS service is recognized and appropriate standards are adopted to prevent interference problems.[12] ProNet submits that this allocation will provide necessary public safety and emergency services.[13] The Valley Emergency Radio Association (VERA) concurs that the proposed allocation and rules recognize immediate needs and will provide a workable environment for both current and future requirements.[14] The National Communications System (NCS), the Oregon Region Relay Council (ORRC), and other commenters agree with our assessment that secondary status is a reasonable means of protecting primary users in the band.[15] Additionally, the Association for Maximum Service Television (MSTV) supports our decision not to allocate the 216-218 MHz band in order to protect television operations and our plan to adopt rules to minimize interference.[16] Lee Sutherland Parr (Parr) supports the allocation, but contends that the best way to protect other services from amateur operations would be to allocate the entire 216-220 MHz band to the amateur service, thereby permitting amateurs more flexibility in the selection of frequencies in order to avoid conflicting operations.[17]

9. A number of parties raise concerns that amateur operations at 219-220 MHz could cause interference to other services. George DuBois (DuBois), Orion Telecom (Orion), and Paging Systems, Inc. (Paging Systems) argue that while they are sympathetic to the amateur request, an amateur allocation at 219-220 MHz would affect adversely the primary AMTS operations in this band.[18] DuBois contends that amateur use of the 219-220 MHz band would be precluded in many areas because of expanding AMTS operations. Alternatively, DuBois recommends that amateurs share the 225-226 MHz government band.[19] Orion similarly states that there are few places where an amateur system could operate without causing interference.[20]

10. Regarding the modulation method to be permitted in the 219-220 MHz band, ARRL and Mike Cheponis (Cheponis) state that digital communications that otherwise comply with the technical rules should be permitted, but that other modulation techniques, such as analog voice, should not be used because they have different interference characteristics.[21] VERA asserts that alternative transmission modes, such as spread spectrum, may be appropriate in the future because amateurs will want to experiment with many forms of digital communications.[22] Roy Gould (Gould) requests that only efficient packet signals using time shared random access be allowed, arguing that permitting old-fashioned radio teletype transmissions on a wideband channel would waste spectrum.[23] Oregon Packet Experimenters Network (OPEN), Mitchell, and other parties state that restricting the modulation method to digital techniques as a method for reducing the potential for interference is not warranted.[24] OPEN argues that the spectrum characteristics of digital and analog modulation types

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[9] This allocation is available for point-to-point intercity links to connect local packet network hubs, forming the backbone for regional or nationwide networks. It is not permitted to be used for local packet networks (which operate on a point-to-multipoint basis) or for mobile uses.

[10] Gary R. Mitchell (Mitchell) requests that the 220-222 MHz band be returned to the amateur service. This request is beyond the scope of this proceeding.

[11] ARRL Comments at 3.

[12] Watercom Comments at 2-4.

[13] ProNet Comments at 1.

[14] VERA Comments at 2.

[15] NCS Comments at 2 and ORRC Comments at 2.

[16] MSTV Reply at 1.

[17] Parr Comments at 1-2.

[18] DuBois Comments at 1-2; Orion Comments at 3-8; and Paging Systems Reply at 1-3.

[19] DuBois Comments at 2.

[20] Orion Comments at 7.

[21] ARRL Comments at 7 and Cheponis Comments at 2.

[22] VERA Comments at 3, 5.

[23] Gould Comments at 2.

[24] OPEN Comments at 2. Mitchell Comments at 1.

are virtually identical with regard to interference potential and that restrictions differentiating between the two are therefore not warranted.

11. *Decision.* We continue to believe that there is a need for a limited amount of additional spectrum in the 220 MHz range for amateur point-to-point fixed digital message forwarding systems. We find that a secondary allocation for the amateur service in the 219-220 MHz band can meet these needs and provide needed spectrum relief for certain amateur requirements including the development of wideband intercity packet networks. In this regard, we are encouraged by ARRL's plan to organize a high-speed, nationwide digital communications network that would use the 219-220 MHz band where available, and other connections where it is not.[25]

12. We also find that amateur operations can utilize the 219-220 MHz segment on a secondary basis without causing interference to other services if their operations are properly engineered and appropriate regulatory safeguards are applied. Specifically, we conclude that amateur services can share spectrum with the primary AMTS. Contrary to Orion's assertion, we believe that with careful attention to frequency and distance separation, amateur stations will be able to share this band with AMTS ship stations. In this regard to ensure that interference is not caused to AMTS operations, we are adopting rules that prevent amateur 219-220 MHz operations within 80 kilometers (km) of AMTS stations without the AMTS licensees' approval and that require that AMTS licensees be notified of all amateur 219-220 MHz operations within 640 km. We believe that by using directional antennas, frequency separation, cross polarizations of signals, and other interference avoidance techniques, amateurs will be able to establish interference free operations. We note that Watercom, the principal AMTS provider, supports the allocation and concurs with most of these conditions of operation for the amateur service. Contrary to Utilities Telecommunications Council's (UTC) concerns, we continue to believe that amateurs will maintain the integrity of their operations and enforce sound engineering practices. We note that the amateur service has a long history of successfully sharing with other users. We also note that the secondary status of the allocation and the technical and operational guidelines we are adopting herein will serve to protect primary services on adjacent frequencies, such as TV channel 13 and land mobile operations at 220-222 MHz. Finally, we do not find that the other spectrum alternatives suggested by the commenters are viable. Specifically, the 225-226 MHz band is utilized by the United States Government and is not available for amateur use at this time. The 220-222 MHz band is being licensed to narrowband private land mobile operations and we anticipate heavy use of this spectrum.

13. With regard to the type of modulation to be authorized in this band, we agree with ARRL and Cheponis that all digital communications that comply with our technical standards should be permitted. We disagree with those parties who advocate permitting analog communications. The record in this proceeding clearly emphasize that this additional spectrum is needed by the amateurs specifically to construct a nationwide point-to-point fixed digital message forwarding system. Given the interference safeguards we are adopting, not all of the channels will be available in all areas. Restricting use of this spectrum to digital message forwarding systems will help ensure that this one megahertz is used efficiently and is sufficient for the operations which justify its allocation.

14. Accordingly, we are allocating the 219-220 MHz band to the amateur service on a secondary basis for point-to-point fixed digital message forwarding systems. This allocation will foster technological experimentation and innovation, particularly with higher data rates, and will facilitate the construction of regional and/or nationwide packet data backbone networks that can be used for emergency communications purposes. This allocation will provide for increased access to communications services for amateurs and will also relieve the congestion that exists in the 222-225 MHz band in certain geographic areas. The amateurs' ability to perform interference analyses, the directional nature of point-to-point communications, the technical rules we are adopting to govern amateur use of this band, and the secondary status of this allocation will adequately protect all primary and existing secondary operations in and adjacent to the 219-220 MHz band.

IV. OPERATIONAL ISSUES

15. In allocating the 219-220 MHz band for amateur use, we seek to provide amateurs with the maximum operational flexibility possible. Operation of amateur services in the 219-220 MHz band on a secondary basis, however, will necessitate careful attention to the potential for interference to primary services and to other secondary services. The rules adopted below are intended to balance our desire to provide flexibility for amateur operations and the need to ensure that such operations do not cause interference to other services.

Technical Standards.

16. In the *Notice*, we proposed that amateur stations in the 219-220 MHz band be permitted to operate with up to 25 watts Peak Envelope Power (PEP) output for the Novice class and 50 watts PEP for all other classes.[26] We indicated that these proposed power limits would allow amateurs to operate effective packet networks while protecting other operations in and near the frequencies being used. Additionally, we requested comment on whether amateur operations in the 219-220 MHz band should be restricted to Technician or higher class amateur licensees. We also requested comment on whether amateur operations in the 219-220 MHz band should be limited to a maximum transmission rate of 56 kilobauds and a maximum bandwidth of 100 kilohertz as specified in Section 97.307(f) of the Commission's Rules.[27]

17. *Comments.* ARRL submits that the 50 watt power limit is appropriate and should prevent harmful interference to other occupants of the band. ARRL also states that most stations operating data communications will use considerably less power than 50 watts.[28] Cheponis suggests that

[25] *See Moved & Seconded,* QST, at 86, January, 1994. We note that the ARRL has completed action on its 219-220 MHz band plan, *see Moved and Seconded,* QST, at 91-92, March, 1995.

[26] *See Notice* at 9, *supra.*

[27] *See* 47 C.F.R. § 97.307(f).

[28] ARRL Comments at 5.

power limits should be set on a spectral density basis and that the limit be 1 milliwatt per hertz.[29] Orion states that amateurs using 25 watts or 50 watts within 50 miles of an AMTS station would devastate the AMTS operations and suggests that a desired signal to undesired signal (D/U) ratio be used to regulate interference instead of power limits and notification requirements.[30]

18. ARRL recommends that only licensees holding Technician or higher class licenses be permitted to use the 219-220 MHz segment because of the level of knowledge and analysis that is required to initiate these types of operations in this band. However, VERA argues that this is not a significant difference between the amateur Novice and Technician licensees and recommends that Novices be permitted to operate in this band without special power limitations established for that class of license.[31]

19. Mitchell, ARRL, Dewayne Hendricks, and others oppose data rate limits and state that bandwidth limitations along with the usual out-of-band radiation specifications are adequate to prevent interference. ARRL states that the appropriate means of limiting interference potential is through specification of bandwidth, rather than limiting the data rate.[32] VERA recommends that the maximum bandwidth be specified as a function of the distance of the center carrier from the band edge.[33] Gould recommends 250 kilohertz channels with no data rate limits, arguing that there is no reason to limit the use of different technologies with an arbitrary baud limit.[34] Watercom opposes any increase in the 100 kilohertz channel bandwidth, stating that an increase in bandwidth would cause an increase in interference problems.[35]

20. *Decision.* While specifying an output power limit by its spectral density may be appropriate, given the wideband characteristic of digital operations[36] amateur service rules are designed to accommodate many different types of operating activities and power traditionally has been defined in terms of peak envelope power for all types of transmission. We do not believe it necessary to complicate the amateur rules by changing the manner in which power is specified in this band. Similarly, the nature of the amateur rules militates against use of D/U ratios. Use of D/U ratios would be unnecessarily complicated because measurements of the signals would be necessary at every primary service licensee's station.[37] We agree with ARRL that a 50 watt power limit is appropriate; and, we are adopting our proposed power limit of 50 watts PEP for amateur operations in the 219-220 MHz band. We also concur with ARRL that, given the interference avoidance requirements in this band, only amateur Technician or higher class licensees should be permitted to operate amateur stations in this band. Given the interference concerns associated with use of this band, we are not permitting Novice class amateur operations since they typically lack the experience of higher class amateur licensees.

21. With regard to channelization, we find that 100 kilohertz channels are appropriate for amateur fixed point-to-point digital communications at 219-220 MHz. This allocation is intended primarily for wideband operations, and the 100 kilohertz channels are appropriate for this purpose. Further, channelizing the band should help limit the potential for interference and ensure that the spectrum is used efficiently. We agree, however, with those commenters that suggest a maximum data rate requirement is unnecessary in this band; and, we are not adopting such a limit.

Coordination of Amateur Services.

22. In the *Notice,* we discussed recommendations from ARRL and Watercom that we include a coordination requirement as part of our plan for regulating interference from amateur operations. However, we concluded that a requirement for mandatory coordination of amateur service licensees by a non-government entity generally is not permissible under the Communications Act of 1934, as amended (the Communications Act).[38] We recommended, however, that the local volunteer amateur coordinators that already address operations in the 222-225 MHz band coordinate amateur secondary operations in the 219-220 MHz band. We stated that local amateur coordinators are qualified to handle any coordination task that may be necessary because the same coordination principles, based upon radiated power, distance, and type of signal modulation that are applicable to coordinating amateur operations are applicable to coordinating amateur operations with non-amateur operations.

23. We also proposed to require licensees of amateur stations to notify the appropriate AMTS licensee of any operation in the 219-220 MHz band within 240 km (150 miles) of an AMTS station and to obtain written approval from the appropriate AMTS licensee before operating any amateur station within 80 km (50 miles) of an AMTS station. We also proposed to require that these actions occur at least fourteen days prior to initiation of the amateur operation. In addition, amateurs would be required to resolve immediately any complaint of interference to an AMTS station that might arise or, alternatively, to cease operation of the transmitter causing that interference. Finally, we proposed to amend the rules to provide that no amateur in the 219-220 MHz band may cause interference to, nor is protected from interference due to operation of primary services in or adjacent to the band.[39]

24. *Comments.* UTC, in its comments, argues that the Commission's interpretation of the Communications Act is incorrect and a non-government entity could coordinate amateur operations at 219-220 MHz. Specifically, UTC contends that Section 332 of the Communications Act does not limit the Commission's authority to utilize a non-government coordinator for amateur operations. UTC argues that local coordinators will not be able to prevent interference

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[29] Cheponis Comments at 2.
[30] Orion Comments at 4-7.
[31] VERA Comments at 5.
[32] ARRL Comments at 6.
[33] VERA Comments at 7-8.
[34] Gould Comments at 1.
[35] Watercom Reply at 1.
[36] Power spectral density is the amount of power per unit of spectrum in a electromagnetic field.
[37] Determining the D/U ratio is further complicated by an amateur's freedom in the equipment it utilizes and its freedom to adjust power.
[38] *See* Communications Act of 1934, as amended, 47 U.S.C. Section 332. Section 332 explicitly authorizes coordination of private land mobile and fixed services by parties who are not employees of the Federal Government. There is no provision for similar coordination arrangements with regard to the amateur service.
[39] *See Notice,* proposed rule Section 97.303(r), at Appendix A.

problems and recommends that a national entity coordinate amateur operations. Alternatively, UTC asserts that the Commission should at least require that all amateurs notify a single entity of all operations, thus providing a single point of contact to enable land mobile operations to investigate interference.[40]

25. Watercom, OPEN, ORRC, ARRL, and others contend that local coordinators are experienced and able to provide coordination services for amateurs in the 219-220 MHz band. Watercom, OPEN, ORRC, ARRL, and others also request that all amateurs be required to notify ARRL of their operations and that ARRL keep a database of all 219-220 MHz operations to aid local coordinators in their task, and that ARRL provide other services in investigating interference. ARRL states that amateurs notifying the ARRL of operations at 219-220 MHz is an essential ingredient in the process of preventing interference problems and maintaining an accurate database of operations. ARRL, OPEN, ORRC, the Portland Amateur Radio Club (PARC) and the Technology Radio Amateur Club (TRAC) assert that ARRL's "800 number" bulletin board system is ideal for a local frequency coordinator's use and has built in mechanisms to protect proprietary coordination information.[41] VERA requests that the Commission establish a procedure for amateurs to identify AMTS station licenses and to make such information available to coordinators and ARRL.[42]

26. In its comments, ARRL states that the proposed notification requirements are reasonable. It also submits that AMTS licensees would be more comfortable with a 640 km (approximately 400 mile) notification requirement, because tropospheric ducting could occasionally cause signals to propagate substantially farther than usual.[43] ARRL states that this additional notification requirement would not be burdensome. ARRL also states that the 80 km requirement for seeking written approval from AMTS facilities is adequate to protect AMTS stations from interference.[44] Watercom agrees.[45] ARRL and Watercom additionally recommend that we adopt a two-step notification procedure whereby notification by an amateur to an appropriate AMTS licensee would occur no less than thirty days prior to initiation of amateur operations, and again seven days prior to initiation of operations. Orion and Paging Systems argue, however, that for AMTS operations to achieve a sufficiently high D/U ratio over amateur operations, no amateur operations should be allowed to operate within 925 km (575 miles) of an AMTS operation without the consent of the AMTS operator.[46] ARRL states in its reply comments that Orion's 575 mile prohibition of amateur operation without AMTS consent is technically flawed and that a worst case analysis yields a separation distance of less than 92 km.[47]

27. Mitchell and VERA argue that private service operators should not be given veto power over amateur operations. VERA contends that AMTS operators may not be technically qualified to determine the likelihood of interference from amateur operations and may refuse permission out of indifference or prejudice. VERA recommends that amateurs within 80 km of AMTS stations be allowed to perform demonstration tests for a sixty day period to test for interference.

28. Finally, regarding the protection of operations with a primary allocation in and adjacent to the 219-220 MHz band, ARRL argues that the proposed rule stating that amateur 219-220 MHz operations cannot interfere with primary operations should not apply insofar as it refers to television, land mobile or IVDS systems operating on adjacent frequencies. ARRL argues that requiring amateur operations to not interfere with primary services outside the 219-220 MHz band would require that amateurs be responsible for correcting interference resulting from design deficiencies in television or IVDS receivers, which is a matter over which amateurs have no control.[48] Additionally, ARRL argues that amateurs should not be responsible for protecting land mobile operations because they are in an adjacent band. ARRL argues that an amateur's responsibility should be limited to the spectrum purity standards in Section 97.307.1[49] However, UTC argues that without adequate safeguards and coordination, amateur operations could cause interference to private land mobile operations at 220-222 MHz. MSTV supports our rule protecting adjacent primary operations, arguing that it is necessary to ensure that the proposed amateur operations do not interfere with reception of television broadcasting.[50]

29. *Decision.* We agree with UTC that the Communications Act now permits us to designate a non-government entity to act as a coordinator for amateur services at 219-220 MHz. Subsequent to the *Notice*, the Omnibus Budget Reconciliation Act of 1993 amended Section 332 of the Communications Act, thereby permitting the Commission to designate a non-government entity as national coordinator for services such as the amateur service at 219-220 MHz.[51] Nevertheless, we do not believe that such an approach is the best solution in this case. We do not believe that a national coordinator is necessary. We agree with the majority of commenting parties that local amateur coordinators are best qualified to coordinate the amateur services at 219-220 MHz. At the same time, we agree that there should be a single national contact point to maintain a database of amateur operations in the 219-220 MHz band

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[40] UTC Comments at 4-6.

[41] ARRL Reply at 4; OPEN Comments at 3; ORRC Comments at 4; PARC Comments at 4; and TRAC Comments at 4.

[42] VERA Comments at 7.

[43] Tropospheric ducting is a phenomenon in which a signal in certain frequency ranges and under certain conditions, is confined within the troposphere and propagates with much lower attenuation than would be obtained in a homogeneous atmosphere. Under these conditions, the signal can travel further.

[44] ARRL Comments at 9.

[45] Watercom Comments at 4.

[46] Orion Comments at 6-7 and Paging Systems Reply at 3.

[47] ARRL Reply at 7-8. ARRL's petition states that in a typical case where 12 dB of signal discrimination, provided by directional antennas and cross polarization, is available, amateur transmitters can operate on the same frequencies as AMTS receivers with a separation distance less than 50 km (31 miles). ARRL Petition at 24.

[48] ARRL Comments at 7.

[49] Section 97.307 sets forth emission standards for amateur operations to ensure that the operations are in accordance with good engineering practice. *See* 47 C.F.R. § 97.307.

[50] MSTV Reply at 1.

[51] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

and provide this information to entities investigating interference. We believe a single database of all amateur operations in this band is crucial to successful sharing of the band. The ARRL has volunteered to serve as this point of contact, and we believe it is an appropriate choice. Accordingly, we will require that all amateurs notify the ARRL of operations in the 219-220 MHz band thirty days prior to initiation of operations. We are specifying in our rules that ARRL maintain a database of these operations and provide the information, upon request, to local amateur coordinators, primary service licensees, and other appropriate entities. We also encourage local amateur coordinators to provide coordination services or assistance to amateurs planning to utilize the 219-220 MHz band.[52] Finally, we concur with VERA that there should be a method for amateurs to find the location of the AMTS stations and encourage ARRL to also provide the AMTS information to amateurs.[53]

30. With regard to coordination and notification distances, we agree with ARRL and Watercom that possibilities for tropospheric ducting make it prudent to specify a longer notification distance, since the occurrence and severity of tropospheric ducting is substantially increased when a signal travels over or near water, especially large bodies of water. In the interest of maintaining simple but effective regulations, we will require amateur operators in the 219-220 MHz band to notify AMTS licensees of any operation within a 640 km (approximately 400 miles) radius. We believe that this requirement will not significantly burden amateurs and will assist AMTS licensees more easily to identify the source of any interference if, in the unlikely event, such interference occurs. We believe that Orion's and Paging Systems' proposed notification distance of 575 miles is excessive and unnecessary. We note that Orion and Paging Systems have not provided any studies to support such a requirement, while technical studies in the record indicate that less separation will prevent interference under all but rare propagation circumstances.

31. As suggested in the *Notice*, we will also require amateurs to obtain written approval from the appropriate AMTS licensee before operating within 80 km (50 miles) of an AMTS station.[54] Further, amateurs will be required to resolve immediately any complaint of interference to an AMTS station or, alternatively, to cease operation. Regarding VERA's suggestion that amateurs planning to establish 219-220 MHz operations within 80 km of an AMTS station be permitted to perform demonstration tests for a sixty day period to test for interference, we believe this is a good idea, but does not necessitate a rule. Our analysis of this band indicates that amateur operations within 80 km of AMTS stations have a potential to cause interference. However, we believe that amateurs can design their system to employ interference avoidance techniques to permit sharing with less distance separation, but the cooperation of the AMTS licensees must be obtained. We will not mandate that AMTS licensees must allow amateur 219-220 MHz stations to operate within 80 km for interference concerns. We encourage licensees of both services to cooperate and promote a successful spectrum sharing situation. Accordingly, all amateur operations in the 219-220 MHz band must notify AMTS operations, within 640 km radius, thirty days prior to initiation of operations and no amateur station may operate in the 219-220 MHz band within 80 km radius of an AMTS station without written approval from the appropriate AMTS licensee.

32. Finally, regarding protection of adjacent channel primary services, we believe that our current rules, the new rules we are adopting herein, and the competence of the amateurs using this band should be sufficient to protect adjacent channel operations. We do not agree with ARRL's opposition to our rule protecting primary operations in and adjacent to the 219-220 MHz band from amateur operations. Television and IVDS operations have a primary allocation and therefore are afforded protection from secondary operations. We do recognize that receiver selectivity and intermodulation distortion characteristics are matters of design, and expect receivers to be designed consistent with good engineering practice. Additionally, our rules require that stations of a service shall use frequencies sufficiently separated from the limits of a band allocated to that service so as not to cause harmful interference to services in immediately adjoining frequency bands.[55] Accordingly, amateur operations in the 219-220 MHz band are not permitted to interfere with, nor are protected from interference by, primary service operations in and adjacent to the 219-220 MHz band.

V. PROCEDURAL INFORMATION

33. *Regulatory Flexibility Analysis.* The analysis pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix B.

34. *Ordering Clauses.* IT IS ORDERED, that the American Radio Relay League, Inc. is designated as the national contact point for all amateur operations in the 219-220 MHz band and is responsible for maintaining a database of all amateur operations in the 219-220 MHz band.

35. Further, IT IS ORDERED, that Parts 2, 80, and 97 of the Commission's rules ARE AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

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[52] We note that business radio services, radiolocation operations, and wildlife telemetry operations also use the 216-220 MHz band. Amateurs contemplating operations in the 219-220 MHz range would need to consider all such operations when performing interference studies and implementing their systems.

[53] This information is on the Commission's database which can be accessed through a contractor, Interactive Systems, Inc. at (703) 812-8270.

[54] Amateurs could identify AMTS stations either through contacting the AMTS licensee(s) in the areas in which they plan to operate, through contacting ARRL, or through the Commission's database of AMTS stations.

[55] *See* 47 C.F.R. §§ 2.102(f), 97.307(e).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Final Rules

Parts 2, 80, and 97 of chapter I of title 47 of the Code of Federal Regulation are amended as follows:

PART 2--FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

a. In the 216-220 MHz band, revise columns 4-6 to read as follows:

§ 2.106 Table of Frequency Allocations

* * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
* * * * *			216-220 MARITIME MOBILE. Aeronautical-Mobile. Fixed. Land Mobile. Radiolocation. 627, US210, US229, US274, US317, G2.	216-220 MARITIME MOBILE. Aeronautical-Mobile. Fixed. Land Mobile. 627, US210, US229 US274, US317, NG152.	MARITIME (80). Private Land Mobile (90). Personal Radio Service (95). Amateur (97).	

* * * * *

b. The text of footnote NG152 in the Non-Government footnotes is added to read as follows:

Non-Government (NG) Footnotes

* * * * *

NG152 The band 219-220 MHz is also allocated to the amateur service on a secondary basis for stations participating, as forwarding stations, in point-to-point fixed digital message forwarding systems, including intercity packet backbone networks.

* * * * *

PART 80--STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.385 is amended by adding a new paragraph (a)(3) to read as follows:

§ 80.385 Frequencies for automated systems.

* * * * *

(a)(3) Channels in the 219-220 MHz band are also used on a secondary, non-interference basis by amateur stations participating in digital message forwarding systems. Amateur stations may not cause harmful interference to AMTS operations and must accept any harmful interference from AMTS operation. Amateur stations within 80 km (50 miles) of an AMTS coast station must obtain written approval from the AMTS licensee prior to operating in the 219-220 MHz band. Amateur stations within 640 km (398 miles) of an AMTS coast station must notify the AMTS licensee in writing at least 30 days prior to initiation of operations in the 219-220 MHz band. All amateur stations must notify the American Radio Relay League in writing at least 30 days prior to initiation of operations in the 219-220 MHz band (ARRL, 225 Main St., Newington, CT 06111-1494).

* * * * *

PART 97--AMATEUR RADIO SERVICE

1. The authority citation for Part 97 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.

2. Section 97.201(b) is revised to read as follows:

§ 97.201 Auxiliary station.

* * * * *

(b) An auxiliary station may transmit only on the 1.25 m and shorter wavelength bands, except the 219-220 MHz, 222.000-222.150 MHz, 431-433 MHz, and 435-438 MHz segments.

* * * * *

3. Section 97.301(a) is revised by changing the third entry in the VHF Wavelength band to read as follows:

§ 97.301 Authorized frequency bands.

* * * * *

(a) * * * * *

Wavelength band	ITU-Region 1	ITU-Region 2	ITU-Region 3	Sharing requirements see § 97.303 (Paragraph)
VHF	MHz	MHz	MHz	
* * * * *				
1.25 m	.....	219-220.....	.....	(a), (e)
-Do-.....	.....	222-225.....	.....	(a)
* * * * *				

4. Section 97.303(e) is added to read as follows:

§ 97.303 Frequency sharing requirements.

* * * * *

(e) In the 1.25 m band:

(1) Use of the 219-220 MHz segment is limited to amateur stations participating, as forwarding stations, in point-to-point fixed digital message forwarding systems, including intercity packet backbone networks. It is not available for other purposes.

(2) No amateur station transmitting in the 219-220 MHz segment shall cause harmful interference to, nor is protected from interference due to operation of Automated Maritime Telecommunications Systems (AMTS), television broadcasting on channels 11 and 13, Interactive Video and Data Service systems, Land Mobile Services systems, or any other service having a primary allocation in or adjacent to the band.

(3) No amateur station may transmit in the 219-220 MHz segment unless the licensee has given written notification of the station's specific geographic location for such transmissions in order to be incorporated into a data base that has been made available to the public. The notification must be given at least 30 days prior to making such transmissions. The notification must be given to:

The American Radio Relay, Inc.
225 Main Street
Newington, CT 06111-1494

(4) No amateur station may transmit in the 219-220 MHz segment from a location that is within 640 km of an AMTS Coast Station unless the amateur station licensee has given written notification of the station's specific geographic location for such transmissions to the AMTS licensee. The notification must be given at least 30 days prior to making such transmissions. AMTS Coast Station locations may be obtained either from:

The American Radio Relay, Inc.
225 Main Street
Newington, CT 06111-1494

or

Interactive Systems, Inc.
Suite 1103
1601 North Kent Street
Arlington, VA 22209
Fax: (703) 812-8275
Phone (703) 812-8270

(5) No amateur station may transmit in the 219-220 MHz segment from a location that is within 80 km of an AMTS Coast Station unless the amateur station licensee holds written approval from that AMTS licensee.

* * * * *

5. The table in Section 97.305(c) is revised by changing the third entry in the VHF wavelength band to read as follows:

§ 97.305 Authorized emission types.

* * * * *

Wavelength band	Frequencies	Emission types authorized	Standards see § 97.307(f), paragraph:

* * * * *

1.25 m	219-220 MHz	Data.....	(13)
-Do-	222-225 MHz	MCW, phone, image, RTTY, data, test...	(2), (6), (8)

* * * * *

6. Section 97.307(f)(13) is added to read as follows:

§ 97.307 Emission standards.

* * * * *

(f) * * * * *

(13) A data emission using an unspecified digital code under the limitations listed in § 97.309(b) of this Part also may be transmitted. The authorized bandwidth is 100 kHz.

7. Section 97.313(h) is added to read as follows:

§ 97.313 Transmitter power standards.

* * * * *

(h) No station may transmit with a transmitter power exceeding 50 W PEP on the 219-220 MHz segment of the 1.25 m band.

APPENDIX B: FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rule Making* in ET Docket 93-40. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

A. *Need for and Objective of Rules:* Our objective is to provide a secondary allocation for the amateur service which will permit amateur service operators to establish point-to-point fixed digital message forwarding systems without interfering with primary services. We believe that the rules are sufficient to permit amateurs to share the spectrum, while the flexibility of the rules will in large part provide amateurs with the operational freedom to which they are accustomed.

B. *Issues Raised by the Public in Response to the Initial Analysis:* No party suggested modifications specifically to the initial regulatory flexibility analysis.

C. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives:* This proposal may provide new marketing opportunities for amateur radio equipment manufacturers, some of which may be small businesses.

APPENDIX C: COMMENTING PARTIES

Comments to the ARRL NPRM for the 219-220 MHz band. (ET Docket 93-40, RM-7747)

1. March 19, 1993 Palm Beach Packet Group, Inc.
2. May 4, 1993 Gary R. Mitchell
3. June 14, 1993 George DuBois, N7RYS
4. June 14, 1993 Authorized counsel or Executive Agent of the National Communications System (NCS)
5. June 14, 1993 The Oregon Region Relay Council
6. June 14, 1993 The Oregon Packet Experimenters Network
7. June 14, 1993 The Portland Amateur Radio Club
8. June 14, 1993 The Technology Radio Amateur Club
9. June 15, 1993 American Radio Relay League, Incorporated
10. June 15, 1993 Mike Cheponis, K3MC
11. June 15, 1993 Fred W. Daniel d/b/a Orion Telecom
12. June 15, 1993 Roy E. Gould, N5RG
13. June 15, 1993 Dewayne Hendricks, WA8DZP
14. June 15, 1993 ProNet, Inc.
15. June 15, 1993 Utilities Telecommunications Council
16. June 15, 1993 Waterway Communications System, Inc.
17. June 16, 1993 Lee Sutherland Parr
18. June 16, 1993 The Valley Emergency Radio Association (VERA)

Reply Comments to the 219-220 MHz Amateur NPRM.

1. July 15, 1993 American Radio Relay League, Incorporated
2. July 15, 1993 The Associated Public-Safety Communications Officers, Inc. (APCO)
3. July 15, 1993 Paging Systems, Inc.
4. July 15, 1993 Waterway Communications System, Inc.
5. July 23, 1993 Late Filed by Association for Maximum Service Television, Inc. (MSTV)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies

Petition for Waiver of Section 69.109
of the Commission's Rules to Provide
Call Completion Service

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 22, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 19, 1994, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish new rate elements under the Information rate category to recover the costs for a call completion service that it plans to offer interexchange carriers (IXCs). In particular, Ameritech seeks a waiver of Section 69.109 of the rules,[1] which establishes a separate rate element and charges for directory assistance provided by LECs. Ameritech also seeks a waiver to establish additional rate elements or to change the rate structure in the event it changes the manner in which its call completion service is provided in the future. For reasons discussed below, we grant Ameritech a waiver of the Commission's Rules in order to establish new rate elements that will recover the costs of its proposed call completion service. We deny Ameritech's request for a blanket waiver of Part 69 to accommodate future changes that it may make to the rates and rate structure for its call completion service.

II. BACKGROUND

2. Ameritech's call completion service would permit callers using Ameritech's interstate information service number (1-area code-555-1212) to complete their interstate telephone calls directly to the number requested by the caller without having to disconnect and redial the telephone number.[2] Ameritech will provide the service to IXCs through dedicated trunks between the IXC's point of presence (POP) and Ameritech's Traffic Operator Position System (TOPS) switches that will carry the information call to the directory assistance operator. If the caller elects to use the call completion service, Ameritech will return the call to the IXC's POP for final termination.[3]

3. Ameritech explains that a new rate element under the Information rate category will permit it to recover the costs of switching the call through the TOPS switch and the incremental directory assistance expenses.[4] Ameritech states that it will recover these costs from the IXC's subscribers on a flat-rate per call basis.[5] Ameritech maintains that since the expenses associated with the provision of interstate directory assistance are presently allocated to the Information rate category, allocating directory assistance call completion costs to the Information category is consistent with the Commission's current rules.[6] Furthermore, Ameritech indicates that grant of the waiver will not undermine the policies supporting Part 69 of the rules because the proposed service was not contemplated when Part 69 was promulgated. Moreover, the current rules do not permit Ameritech to recover the costs of this service from the cost-causative customer.[7] Ameritech further asserts that grant of the waiver will provide end users with the ease and convenience of completing two telephone calls with one call, and it reports that several regional IXCs have already expressed interest in purchasing the call completion service as soon as it is available. Accordingly, Ameritech argues that the availability of call completion service will serve the public interest.[8]

4. Two parties responded to the Public Notice seeking comments on Ameritech's petition -- MCI Telecommunications Corporation (MCI) and Southwestern Bell Telephone Company (Southwestern Bell).[9] MCI contends that Ameritech's call completion service is actually an operator service whose costs should not be placed in the Information rate category.[10] MCI argues that because Ameritech's call completion service connects the call back to the Ameritech local network for completion through the IXC's POP rather than providing additional directory assistance, the service is similar to operator transfer services, in which callers are transferred to their IXC of choice. Citing the *Southwestern Bell Operator Transfer Services Order*,[11] MCI asserts that the Common Carrier Bureau has found that the provision of operator services and information services are distinct services that should not be combined.[12] MCI contends that because Ameritech seeks to offer an operator service as an addition to its directory assistance, it should have petitioned for waiver of Section 69.4(b) of the Commission's Rules.[13] MCI argues that because Ameritech has requested a waiver of the wrong rule section, its petition should be denied.[14]

5. Southwestern Bell filed comments supporting Ameritech's request to establish new Part 69 rate elements for call completion service. Southwestern Bell indicates, however, that it may have been more appropriate for

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1 47 C.F.R. § 69.109.
2 Ameritech Petition at 1.
3 *Id.*
4 *Id.* at 2.
5 *Id.*
6 *Id.*
7 *Id.* at 3.
8 *Id.*
9 Public Notice, Ameritech Operating Companies Petition for Waiver of Section 69.109, DA 94-1084, released Oct. 4, 1994.
10 MCI Comments, filed Oct. 20, 1994, at 3-4.
11 Southwestern Bell Telephone Companies, Transmittal No. 1874, Petition for Waiver of 69.4(b) of the Commission's Rules, 5 FCC Rcd 3452 (Com. Car. Bur. 1990) (*Southwestern Bell Operator Transfer Services Order*).
12 MCI Comments at 4.
13 47 C.F.R. § 69.4(b).
14 *Id.* at 5.

Ameritech to have requested a waiver of other rules, such as Section 69.4.[15] In any event, it states that the Commission should grant both Ameritech's waiver request, as well as similar requests that other LECs may file in the near future to provide call completion service.[16] Southwestern Bell also encourages the Commission to allow the LECs to determine their own cost recovery method, rather than mandating uniform rate elements.[17]

6. Ameritech maintains in reply that call completion service is related to directory assistance and that, consistent with its rules, the Commission may allocate those costs to the Information rate category.[18] Ameritech emphasizes that call completion service will only be available upon the caller's receipt of directory assistance information and will produce costs incremental to directory assistance. In any event, Ameritech encourages the Commission to grant a waiver of whatever rule it deems appropriate.[19]

7. Ameritech also seeks waiver of our Part 69 rules to establish additional rate elements or to change the rate structure for call completion service in the event it changes the manner in which the service is provided.[20] It maintains that the grant of such authority would serve the public interest by conserving the resources that would be expended by Ameritech and the Commission if it filed additional waiver requests.[21]

8. MCI argues that Ameritech has failed to show "good cause" for grant of its blanket waiver request to establish additional rate elements or to change the rate structure of the call completion service in the future.[22] MCI contends that Ameritech's waiver request lacks specificity, is unsubstantiated, and does not demonstrate how grant of such a waiver request would serve the public interest.[23] Ameritech did not respond to these MCI arguments.

III. DISCUSSION

9. Commission rules may be waived for good cause shown.[24] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[25] In addition, the United States Court of Appeals for the District of Columbia Circuit has stated that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[26] Waiver is thus appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than strict adherence to the general rule.[27]

10. In determining whether the requested waivers better serve the public interest, we consider some of the goals of the access charge proceeding that led to the establishment of the access charge rate elements.[28] Two of the goals in that proceeding were to establish a competitive interstate service market structure and to adopt a set of access rules that would cover all access facilities and services.[29] In order to further the goals of that proceeding, the Commission prescribed in Part 69 a set of rate elements for the access services that local exchange carriers (LECs) -- such as the Bell Operating Companies (BOCs) -- would be likely to provide at the time of divestiture. Part 69 initially included an "Operator Assistance Element," which was to be assessed in instances where a LEC operator provides "direct assistance" to complete an interexchange call. Because the Commission did not expect that the BOCs would be providing such operator call processing services after divestiture, however, the Commission eliminated the element in 1983.[30] Over a decade later, companies now seek to resume providing such services.

11. We find that Ameritech's proposed call completion service will offer IXCs and their customers a greater range of service choices, which, in turn, generally foster greater competition in the telecommunications market. As noted above, however, existing access rate elements are not designed to recover the cost of this proposed service. Hence, grant of a waiver of Part 69 will enable Ameritech to establish new rate elements for this service that are tailored precisely to that service. Creation of new rate elements will also advance the goals of the Commission's access charge regime by enabling Ameritech to recover the cost of this service from those customers who use it. In light of these two important benefits -- fostering competition and advancing a more economically efficient regulatory scheme -- we conclude that grant of a waiver of Part 69 will serve the public interest more effectively than requiring Ameritech to use the existing Part 69 rate elements.

12. We find, however, that the appropriate rule section to waive for call completion service is not Section 69.109, which establishes the Information rate element. The Information element recovers costs associated with the provision of directory assistance, *i.e.*, an operator giving a telephone number to a caller. The Commission created Section 69.109 as a separate element to facilitate recovery of those costs from users of directory assistance.[31] The call completion service described in Ameritech's waiver request performs a function that goes beyond directory assistance.

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15 Southwestern Bell Comments, filed Oct. 19, 1994, at 1.
16 *Id.*
17 *Id.* at 1-2.
18 Ameritech Response filed Nov. 1, 1994, at 2.
19 *Id.* at 3.
20 *Id.* at 2.
21 *Id.*
22 MCI Comments at 5-6.
23 *Id.*
24 *See* 47 C.F.R. § 1.3.
25 *See Northeast Cellular Tel. Co. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).
26 *WAIT Radio v. F.C.C.*, 418 F.2d. 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).
27 *Northeast Cellular*, 897 F.2d at 1166.
28 *See, e.g.*, MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 308-09 (para. 229) (1983) (*Access Charge Decision*), *modified on recon.*, 97 FCC 2d 682 (1983), *modified on further recon.*, 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part, National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further recon.*, 99 FCC 2d (1984), 101 FCC 2d 1222 (1985), *aff'd on further recon.*, 102 FCC 2d 849 (1985).
29 *See* MTS and WATS Market Structure, Notice of Inquiry and Proposed Rulemaking, CC Docket No. 78-72, 67 FCC 2d 757 (1978) (*Access Charge Decision*), 93 FCC 2d at 245-47 (paras. 9-15) (1983).
30 *See Access Charge Decision*, 97 FCC 2d at 738 (para. 136).
31 *See Access Charge Decision*, 93 FCC 2d at 308 (1983).

Thus, we conclude that the proposed rates for call completion service should not be included within the Information element.

13. We instead grant Ameritech a waiver of Section 69.4(b) of the rules, which provides that LEC charges for access service shall include certain specified rate elements. In the *Southwestern Bell Operator Transfer Services Order*, Southwestern Bell requested, among other things, a waiver of the Part 69 cost allocation requirements to allocate the costs of providing operator call processing services to the Information rate element. In denying Southwestern Bell's request, the Bureau found that the addition of operator service costs or revenues to the Information element that are not related to directory assistance would frustrate the policies underlying Part 69 of the rules.[32] The Bureau, however, did grant Southwestern Bell a waiver of Section 69.4(b) to establish an access element to recover the cost of operator services. We believe that Ameritech's call completion service – which does not convey any information to the caller, but merely connects the call back to the Ameritech local network for completion – is similar to Southwestern Bell's operator transfer service, in which callers are transferred to the IXC of their choice.[33] This service is also similar to the operator call completion services for which Bell Atlantic and Southwestern Bell were recently granted waivers of Section 69.4(b).[34] Because there are no existing rate elements for the service that Ameritech seeks to provide, grant of a waiver of Section 69.4(b) of the rules will permit Ameritech to recover the costs of providing call completion service through a new access rate element that will be assessed to IXCs.

14. Finally, Ameritech has not demonstrated good cause for a blanket waiver to establish additional rate elements or to change the rate structure of the call completion service in the future. In particular, Ameritech has not demonstrated that the application of the Commission's rules will result in inequity or hardship, and it fails to show that a grant of such a waiver request will serve the public interest. Therefore, we deny this part of Ameritech's waiver request.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, the petition for waiver filed by the Ameritech Operating Companies IS GRANTED, to the extent provided herein, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[32] *Southwestern Bell Operator Transfer Services Order*, 5 FCC Rcd at 3453.

[33] Southwestern Bell's operator transfer service directs O-interLATA interexchange traffic to the end user's preferred IXC, if that IXC has subscribed to the service. This service altered Southwestern Bell's earlier practice of defaulting originating O- interLATA traffic in Southwestern Bell's territory to American Telephone and Telegraph (AT&T).

[34] *See* Bell Atlantic Telephone Companies and Southwestern Bell Telephone Company, Petition for Waiver of Section 69.4(b) of the Commission's Rules, DA 94-1397, (released Dec. 6, 1994). These operator call completion services would provide IXCs with live and automated operator assistance for such tasks as the handling of collect, calling card, and billed-to-third-number calls.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1995

SNET REQUESTS APPROVAL OF REVISED ZONE DENSITY PRICING PLAN

Pleading Cycle Established

COMMENTS: April 6, 1995
REPLY COMMENTS: April 13, 1995

On February 28, 1995, the Southern New England Telephone Company (SNET) requested approval of a revision to its current zone density pricing plan.[1] SNET states that the revision would allow it to move four offices from Zone 1 to Zone 2 and would more accurately reflect current measures of traffic and costs among SNET's serving wire centers.

SNET says that upon approval of this plan, it will file all necessary and appropriate documentation reflecting any changes in price cap indices resulting from the revised office classifications.

Interested parties may file comments on SNET's request no later than April 6, 1995. Replies must be filed by April 13, 1995.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its offices at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wendy Kirchick, Tariff Division, Common Carrier Bureau, (202)418-1530.

FEDERAL COMMUNICATIONS COMMISSION

[1] *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992), *aff'd*, 9 FCC Rcd 5154 (1994) (Commission permitted Tier 1 local exchange carriers, except those companies that remain in the National Exchange Carrier Association pool, to introduce zone density pricing of interstate high-capacity special access services in a study area after their expanded interconnection offerings are operational in that study area).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 24, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC'S SUPPLEMENTAL INFORMATION TO ITS SECTION 214 APPLICATIONS

FILE NOS. W-P-C-6913, 6914, 6915, 6916

On March 21, 1995, Pacific Bell filed a letter providing supplemental information on its Section 214 applications to construct, own, and operate facilities to provide video dialtone service. The applications were initially filed on December 20, 1993.

Interested parties are invited to file comments on the supplemental filing only. Comments should be filed by **April 14, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the supplemental filing can be obtained from ITS at (202) 857-3800. The supplemental filing is available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1779
Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: March 23, 1995; Released: March 24, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On February 21, 1995, Pacific Bell filed Transmittal No. 1779 to revise its Tariff F.C.C. No. 128 to make certain in-band rate changes for its Special Access Video Service. Transmittal No. 1779 is scheduled to become effective on March 25, 1995.[1]

2. On March 14, 1995, Leland Stanford Junior University (Stanford) filed a petition to reject or suspend and investigate Transmittal No. 1779, to which Pacific Bell replied on March 17, 1995. Stanford contends that Pacific Bell's proposed tariff revisions would increase its charge to Stanford by approximately 70 percent per month. Stanford Petition at 1. Stanford asserts that such a rate increase is unjust and unreasonable because Pacific Bell's cost of providing the service has not increased proportionally and is not cost-justified. *Id.* at 2. Stanford further argues that Pacific Bell's proposed rate changes are unreasonably discriminatory because they do not represent a fair and equitable allocation of costs for the services provided. *Id.* Finally, Stanford contends that the notice of the rate changes it received from Pacific Bell was defective because it did not contain the transmittal number for the revised tariff filing. *Id.*

3. Pacific Bell first states that Stanford's petition was late-filed and that Stanford failed to deliver a copy of its petition to Pacific Bell.[2] Pacific Bell Reply at 1. Pacific Bell further argues that its proposed tariff revisions constitute a within-band, within-cap adjustment to its Video Channel Mileage rates. *Id.* at 2. Pacific Bell asserts that it has provided the necessary cost support with its tariff filing, including a revised Actual Price Index and Service Band Index in accordance with Section 61.49(b) of the rules, 47 C.F.R. § 61.49(b). *Id.* Pacific Bell dismisses Stanford's claim that the proposed rate increases are unjust and unreasonable, maintaining that its Video Service rates are based on study-area costs and thus are fair and equitable. *Id.* at 3.

4. The Tariff Division has reviewed Pacific Bell's Transmittal No. 1779 and the related pleadings. We conclude that Pacific Bell's filing is not patently unlawful so as to warrant rejection and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Pacific Bell's revisions to Tariff F.C.C. No. 128, Transmittal No. 1779, filed by Leland Stanford Junior University, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

[1] Transmittal No. 1779 was originally filed on 14 days' notice, to become effective on March 7, 1995.

[2] Although Stanford's petition was filed outside of the pleading cycle established by Section 1.773(a)(2)(i) of the rules, 47 C.F.R. § 1.773(a)(2)(i) for tariffs filed on less than 15 days' notice, we do not consider it untimely filed. We note that Pacific Bell did not provide prompt and adequate notice of Transmittal No. 1779 to its customers as required by Section 61.58(a)(4) of the rules, 47 C.F.R. § 61.58(a)(4). On March 7, 1995, under Transmittal No. 1783, Pacific Bell deferred the effective date of Transmittal No. 1779 until March 21, 1995 in order to provide such notice. After receiving proper notice of the proposed rate changes from Pacific Bell, Stanford then submitted its petition in a timely manner.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Non-Voice, Non-Geostationary Mobile Satellite Applications of	
CTA COMMERCIAL SYSTEMS, INC.	File No. 23-SAT-P/LA-95
E-SAT, INC.	File No. 24-SAT-P/LA-95
FINAL ANALYSIS COMMUNICATION SERVICES, INC.	File No. 25-SAT-P/LA-95
GE AMERICAN COMMUNICATIONS, INC.	File No. 26-SAT-P/LA-95
LEO ONE USA CORPORATION	File No. 27-SAT-AMEND-95
ORBITAL COMMUNICATIONS CORPORATION	File No. 28-SAT-MP/ML-95
VOLUNTEERS IN TECHNICAL ASSISTANCE	File No. 29-SAT-AMEND-95

ORDER

Adopted: March 23, 1995; Released: March 24, 1995

By the Chief, Satellite and Radiocommunication Division:

1. On March 21, 1995, GE American Communications, Inc. (GE Americom) filed a Motion for Extension of Time to File Replies in the above-referenced non-voice, non-geostationary (NVNG) mobile satellite service applications. LEO One USA Corporation (LEO One) filed an opposition to the motion. For the reasons discussed below, we grant GE Americom's motion.

2. Seven parties filed second round NVNG applications in response to the November 16, 1994 cut-off date established by the Commission. These applications were placed on Public Notice (*see* Report No. DS-1484, DA 94-1323 (released November 25, 1994)) and pleading dates were established. On December 21, 1994, in response to a request by Orbital Communications Corporation (Orbcomm), the date for filing comments was extended thirty days, until February 24, 1995 (*see* Extension Order, DA 94-1563 (released December 22, 1994)). GE Americom is seeking a two-week extension, until April 10, 1995, in which to file replies to the comments and petitions filed in the above referenced applications proceeding.

3. GE Americom cites the large number of comments and petitions to be addressed in replies, indicating that more time is necessary to fully address all the issues. In addition, GE Americom points to meetings in Geneva in preparation for WRC-95, stating that a number of representatives of NVNG applicants are attending these meetings. GE Americom states that grant of this motion will cause no harm to the public interest.

4. In opposition, LEO One states there has been an adequate amount of time to respond to the petitions and comments, particularly since applicants need only respond to the petitions or comments directed to its own application. In addition, LEO One indicates that it was only afforded thirty days to respond to the petitions filed against its application. Finally, LEO One points out that the Commission has already granted one thirty day extension reply deadline and any further extension will cause delays in the Commission's consideration of these applications.

5. GE Americom has notified all parties and has indicated that, aside from LEO One, no other party to these proceedings opposes grant of this motion. In light of the general support for this extension, the WRC-95 preparatory meeting, and the number of pleadings to be analyzed, we believe that a two-week extension of time to file replies is warranted and will not delay Commission action on the second round applications.

6. Accordingly, pursuant to Section 0.261 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.261, IT IS ORDERED that the pleading cycle of the referenced NVNG applications is extended as follows: Replies may be filed on or before April 10, 1995 and Responses may be filed on or before April 25, 1995.

7. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief, Satellite and
Radiocommunication Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Parts 2 and 90 of the
Commission's Rules to Permit
New York Metropolitan Area
Public Safety Agencies to Use
Frequencies at 482-488 MHz
on a Conditional Basis

ORDER

Adopted: March 14, 1995; Released: March 17, 1995

I. INTRODUCTION

1. By this action, the Commission waives Parts 2 and 90 of its rules to permit the temporary assignment of frequencies in the 482-488 MHz band (television Channel 16) to public safety agencies in the New York City metropolitan area. Public safety use of these frequencies will be permitted for a period of at least five years or until the Commission assigns Channel 16 in New York City for advanced television service (ATV) and the television broadcast licensee begins to utilize Channel 16 for ATV operations. This band is currently allocated to the broadcasting service but is not allotted for use in New York City. We find that circumstances exist that warrant a waiver of our rules to permit use of this spectrum by public safety radio services in the New York City metropolitan area. Granting this conditional waiver will provide public safety agencies with immediate spectrum relief that is urgently needed in the congested New York City metropolitan area.

II. BACKGROUND

2. On April 10, 1992, the New York City Public Safety Agencies (Agencies),[1] a group of twelve public safety agencies in the New York City metropolitan area, filed a Joint Request for Waiver (Waiver Request) seeking to use television Channel 16 for public safety communications in the New York City metropolitan area. In their Waiver request, the Agencies submit that the sheer size and density of the New York metropolitan area's resident, working and visitor populations present unique challenges to public safety agencies. They state that, in this environment, public safety agencies must rely on modern radio communications systems to support their operations. They further indicate that increased demand for radio communications channels has far outstripped the capacity of the channels allocated for public safety communications purposes in the New York City area. The Agencies state that they must update, expand and modernize their radio communications systems to carry out their mandated responsibilities; but there are no frequencies available in the New York City metropolitan area that can meet their immediate needs. In addition, the Agencies note that not all New York City emergency response agencies can communicate with one another via radio at the scene of an emergency incident. Their goal is to implement a mutual aid network on the requested frequencies to permit effective coordination of their responses to emergency situations.

3. The Agencies submit that the requested frequencies can be used for public safety systems within the New York city metropolitan area without causing harmful interference to any full power broadcast television stations. They state that they would use Channel 16 in a manner such that their operations do not cause interference to TV service and to have their licenses conditioned on that basis. Further, the Agencies note that there is a potential low power television (LPTV) station on adjacent Channel 17,[2] and that they would coordinate with the licensee for that station to ensure that their proposed operations would not cause harmful interference to the LPTV station operation. As with respect to full power broadcast stations, the Agencies would accept a condition on use of Channel 16 on the basis that their operations not cause interference to LPTV operations.

4. Since the time of the filing of the Waiver Request, the Commission has taken action to implement advanced television technology (ATV) in the United States by proposing to assign to each existing station a second channel that would be utilized for ATV on a simulcast basis. On August 5, 1992, the Commission published a draft Table of Allotments for ATV that included an allotment for Channel 16 in New York City.[3]

5. On April 14, 1994, the Agencies filed a Supplement to Request for Waiver (Supplement) that provides additional information to justify the Waiver Request and to assess the impact of the ATV proceeding on the Waiver Request. The Supplement discusses data collected from the Agencies intended to confirm that the channels currently allocated for public safety use are severely overloaded. These data indicate that loading on the channels used by the Agencies substantially exceeds the maximum levels set forth in our rules. As a result, the Agencies experience delays and backlogs in even the most critical radio transmissions.

6. In the Supplement, the Agencies contend that use of Channel 16 is the only realistic alternative for immediately resolving the public safety spectrum shortage in New York City. They state that investment in trunking technology for the existing spectrum would not be feasible because the one-time cost (estimated at over $275 million) would be prohibitive and the Agencies consider other technologies, such as narrow-band equipment, to be so new as to be

[1] These public safety agencies consist of: New York City Police Department; New York City Fire Department; New York City Emergency Medical Services; New York City Department of Corrections; New York City Transit Authority; New York Department of Transportation; New York City Health and Hospitals Corporation Police; New York City Department of Parks and Recreation; New York City Department of General Services; Nassau County Police Department; Elmont Fire District; and Town of Islip.

[2] Trimtab Productions, Inc. has been issued a Construction Permit for an LPTV station, W17BM, New York, New York.

[3] *See Second Further Notice of Proposed Rule Making,* MM Docket No. 87-268, 7 FCC Rcd 5376 (1992).

untested on the scale needed. They argue that allocation of a channel other than Channel 16 would involve similar costs. The Agencies currently operate primarily in the 450-482 MHz band, which encompasses television Channels 14 (470-476 MHz) and 15 (476-482 MHz).[4] If the Agencies are granted spectrum contiguous to the existing spectrum, they could utilize their existing radio equipment, with minor, inexpensive modifications, for operations on both the existing frequencies and the new spectrum. Allocation of a non-contiguous channel, however, would require replacement of the existing equipment with equipment designed to accommodate both the existing and new bands. The Agencies estimate that such replacement would cost upwards of $200 million, which they allege would be prohibitively expensive.

7. The Agencies maintain that provision of Channel 16 for public safety would not curtail ATV implementation in New York because there are other channel options for providing ATV. They argue further that Channel 16 should not be a candidate for consideration for an ATV allotment in New York City due to the possibility of creating interference to public safety operations on the adjacent Channel 15. The Agencies note that an ATV transmitter on Channel 16 would likely be located on either the Empire State Building or the World Trade Center in New York, where it would be co-located with public safety stations using Channel 15. They state that this would violate the FCC separation restrictions for adjacent channel operations and create the potential for adjacent channel interference.[5]

8. On November 21, 1994, the Agencies amended their Waiver Request by submitting a Request for Conditional Waiver of Parts 2 and 90 of the Rules of the Federal Communications Commission (Conditional Waiver Request) in order to utilize Channel 16 for public safety communications on an interim basis. The Conditional Waiver Request includes an Agreement between the Agencies and the Television Broadcasters All Industry Committee (Broadcasters), a group of broadcast licensees of television broadcast stations operating in the New York City metropolitan area.[6] The Broadcasters submitted concurrently a Statement in Support of the Conditional Waiver Request.

9. The agreement between the Agencies and the Broadcasters would satisfy the immediate need of the Agencies for additional spectrum for public safety operations while preserving the possibility that Channel 16 will ultimately be utilized for ATV operations in New York City. Under the terms of the agreement, the Agencies would operate on Channel 16 on an interim basis until such time, but in no event for less than five years, when that channel is allotted in the New York City metropolitan area for ATV, and a television broadcast licensee is authorized and begins to utilize Channel 16 for ATV broadcast operations.

10. The Agencies and Broadcasters foresee a number of additional benefits that would accrue from a grant of the Conditional Waiver Request. Under the agreement: 1) they will work with major equipment manufacturers to promote the development of spectrum efficient land mobile technology; 2) the Broadcasters will exert their influence to facilitate testing by the "Advisory Committee on Advanced Television Services of the FCC" with respect to ATV-to-land mobile interference; 3) the Broadcasters and the Agencies will jointly explore creative solutions to reduce the extent of the Agencies' utilization of spectrum resources; and, 4) the Agencies will employ reasonable efforts to implement Mobile Data Voice communications.[7] The Agencies also will commit, with the cooperation of the Broadcasters, to restrict their operations on Channel 16 so as to ensure that interference will not result to the operations of any existing NTSC[8] broadcast operations in the vicinity of New York City. The agreement includes appropriate standards and operating parameters for the land mobile operations intended to ensure that the Agencies' operations on Channel 16 would not result in prohibited interference to the operations of existing television broadcast licensees.[9] We note that the Agencies also expressed a willingness to establish a new coordination body, the New York City Public Safety Agency Coordinating Committee, to oversee frequency coordination in the Channel 16 band. This committee will serve in an advisory capacity to the APCO Regional Frequency Coordinator. Coordination between the Public Safety agencies and New York City broadcast interests will be conducted through a joint committee composed of representatives of the Agencies and the Broadcasters. We anticipate that affected LPTV operators will participate in this coordination. Finally, we note that the agreement contemplates periodic reports from the Joint Committee to the Commission. We anticipate that these reports will be made annually at a minimum.

11. The Conditional Waiver Request, including details of the supporting agreement was released for public comment on December 14, 1994.[10] Comments were filed by the Association for Maximum Service Television, Inc. (MSTV); the Association of Public Safety Communications Officials International, Inc. (APCO); the Atlantic Chapter of APCO; the Association of Federal Communications Consulting Engineers (AFCCE); the New York State Law Enforcement Telecommunications Committee; the New York City Transit Authority; and Trimtab Productions, Inc. (Trimtab), the permittee of LPTV station W17BM in New York City. Reply comments were filed by National Innovative Programming Network, Inc., the tentative selectee for a LPTV

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[4] *See* 47 C.F.R. §§ 90.307 and 90.309.D

[5] *Id.*

[6] The Broadcasters consist of CBS Inc. (WCBS-TV, New York Channel 2); American Broadcasting Companies, Inc. (WABC-TV, New York Channel 7); National Broadcasting Company, Inc. (WNBC-TV, New York Channel 4); WPIX Inc. (WPIX-TV, New York Channel 11); Educational Broadcasting Corporation (WNET, Newark, New Jersey Channel 13); WNJU Broadcasting Corporation (WNJU-TV, Linden, New Jersey Channel 47); WNYC Communications Group (WNYC-TV, New York Channel 31); Fox Television Stations, Inc. (WNYW, New York Channel 5); WWOR-TV, Inc. (WWOR-TV, Secaucus, New Jersey Channel 9), and WXTV License Partnership, G.P. (WXTV, Paterson, New Jersey Channel 41).

[7] Mobile Data Terminals Systems use digital technology and provide non-voice data transmission capability. These systems use less spectrum than voice communications and thus are more efficient.

[8] National Television Systems Committee, an industry group first established in 1940 to develop television broadcast standards and used as a reference when describing the existing television standard.

[9] *See* Conditional Waiver Request at Attachment B.

[10] *See Public Notice,* Released December 14, 1994, DA 94-1459.

station for Channel 19 in New York City, and the Agencies. No opposition to the Conditional Waiver Request was filed. However, some issues were raised by the parties and these are discussed in the following paragraphs.

III. DISCUSSION

12. Based on the record, we believe that the public safety agencies in the New York City metropolitan area have an urgent and immediate need for additional spectrum capacity for public safety communications. Further, we believe that use of Channel 16 will provide immediate and necessary relief to these public safety agencies and will also allow for development of interoperability of communications between the public safety agencies. Finally, we conclude that this spectrum relief for the New York City public safety agencies can be accomplished without adversely affecting existing TV operations or our plans for implementation of ATV. Therefore, we find that the conditional grant of a waiver to the Agencies to use television Channel 16 is in the public interest. We are conditioning the grant of the waiver to reflect the concerns of broadcasters, as discussed below.

13. MSTV is concerned that grant of a waiver for use of Channel 16 for land mobile public safety operations could interfere with the implementation of ATV.[11] It argues that any permanent re-allocation of broadcasting spectrum to the land mobile public safety services prior to resolution of the regulatory and technical issues associated with the implementation of ATV will frustrate the full implementation of ATV. However, MSTV does not object to the conditional grant of a waiver for public safety use of Channel 16; but it requests that reporting requirements regarding loading and use of this band be imposed on the public safety users and that the waiver be granted for one year terms so that an annual determination can be made regarding renewal of the waiver authority. In reply, the Agencies point out that the requested waiver would be conditioned upon there being no broadcaster authorized and ready to commence ATV operations on Channel 16 in New York and that the agreement between the Agencies and the Broadcasters provides for periodic updates from the Agencies to the Commission.

14. We believe that the conditional waiver envisioned in the agreement between the Agencies and the Broadcasters sufficiently ensures that if Channel 16 is required for ATV implementation, it will be available on a timely basis.[12] Further, the periodic submission to the Commission of reports on the progress made with respect to the technical issues, as discussed in the agreement, should insure that the public safety agencies are moving toward the implementation of spectrum efficient technology. Therefore, we agree with the Agencies that annual renewal action would be unnecessary and a waste of resources in light of the reporting requirement. Requiring one-year renewals also does not provide the Agencies sufficient assurance of continued operation over the five years to justify the expenditures that they will make.

15. Trimtab argues that the Agencies have underestimated the extent of potential interference from its Channel 17 low power television station and that such operation will limit use of Channel 16 for land mobile public safety purposes. Further, it argues that the Agencies must protect Trimtab's low power television operation on Channel 17 from interference from public safety operations.[13] In reply, the Agencies contend that the adjacent channel interference issue raised by Trimtab is not unusual and can be resolved through standard engineering practices, including the use of radio frequency (RF) filtering.

16. We agree with the Agencies that the potential for adjacent channel interference to public safety operations on Channel 16 from LPTV operations on Channel 17 can be eliminated through engineering approaches and that Channel 16 can be utilized by public safety entities despite the close proximity of the LPTV operations. With respect to potential interference to the LPTV operations from the public safety operations, we also agree with the Agencies' conclusion that, due to the relatively low power and transient nature of the public safety mobile equipment, the likelihood of interference will be small; and any such interference likely would be insignificant and transient in nature. In any case, the Agencies indicated in their initial Waiver Request that they will correct any instance of interference to low power television operations.[14] Based on the record and on the commitment from the public safety agencies, we conclude that this should be sufficient assurance that television operations will be adequately protected. We therefore will specify in the grant of the Waiver Request that LPTV station W17BM has no responsibility to protect land mobile operations on adjacent TV Channel 16 other than from spurious emissions that exceed those permitted by our rules. We will also specify that land mobile licensees must correct, at their expense, interference caused by their operations to the reception of W17BM within its protected signal contour.[15]

17. APCO supports the Conditional Waiver Request, but recommends that we require that narrow-band equipment, utilizing 12.5 kHz channels, be used when implementing public safety communications links in the band.[16]

18. We encourage the public safety agencies to utilize narrow-band equipment or other spectrum efficient technology as soon as feasible in this spectrum. However, to maintain flexibility for the public safety community, we will not require here that any specific equipment or technology be used. This will allow the Agencies to fully utilize this band in whatever manner they choose in order to

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[11] *See* MSTV comments at 5.

[12] The parties to the agreement anticipate that, based on the latest Master Calendar of the FCC advisory Committee on Advanced Television Service and an approximate schedule for FCC action, some stations around the country could be issued an ATV license and a construction permit to begin ATV service in the first half of 1997. Purchase and installation of ATV transmitting equipment is estimated to take about one year; thus, early ATV broadcasts could begin by mid-1998. However, in New York, the parties expect that it will take additional time to locate and construct an ATV transmission site, due to the extreme congestion in Manhattan where a co-sited antenna farm would likely be located. They believe that it may require an additional three or four years to begin ATV transmissions in New York City, and thus ATV broadcast operations in New York City is unlikely in the next five years.

[13] *See* Trimtab comments at 1-3.

[14] *See* Waiver Request at 35.

[15] The protected signal contour for LPTV stations is defined in § 74.707 of the Commission's Rules.

[16] *See* APCO comments at 3.

provide for important public safety communications. However, over the five year period of the conditional waiver, we do expect substantial progress on the part of the Agencies to develop spectrum efficient systems in this spectrum as well as the existing public safety bands, as discussed above.

19. In a related matter, on April 21, 1994, the New York City Transit Police (NYCTP), one of the agencies participating in the Waiver Request, submitted its own Request for Waiver to use fifteen land mobile channels out of television Channel 19 for its public safety operations. NYCTP stated that it was submitting this request because it has a stringent implementation schedule associated with funding for a multi-million dollar radio communication capital program. Since Channel 19 had not been proposed for allotment for ATV by the Commission, it was perceived by NYCTP to be readily available for land mobile purposes, and funds available to NYCTP would permit it to build a new radio system utilizing Channel 19 frequencies. However, NYCTP has indicated that if the Commission were to act in an expeditious manner on the Agencies' request to use Channel 16, its own request for Channel 19 would become unnecessary. We believe that having all the parties operate on Channel 16 will be spectrum efficient and increase interoperability among the public safety agencies in the New York City metropolitan area. Therefore, we are dismissing the NYCTP request to use Channel 19.

IV. ORDERING CLAUSES

20. It is hereby ORDERED THAT, the Joint Request for Waiver filed by the New York Public Safety Agencies is GRANTED to the extent discussed herein, for a period of at least five years or until any television broadcast licensee in the New York City metropolitan area initiates use of Channel 16 for ATV broadcast operations, whichever is longer, Sections 2.106 and 90.311 of the Commission's Rules are waived so that New York City metropolitan area public safety agencies may use 482-488 MHz, for land mobile public safety services under the conditions specified in the Appendix. It is hereby further ORDERED THAT the Request for Waiver filed by the New York City Transit Police Department to use television Channel 19 IS DISMISSED. These actions are taken pursuant to sections 4 (i), 303 (c), (f), (g), and (r), and 309 (a) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154 (i), 303 (c), (f), (g), and (r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

In order to prevent interference between the proposed land mobile operations on Channel 16 in New York City and the existing television operations of WNEP-TV in Scranton, Pennsylvania on Channel 16 (FCC File Number BLCT-2623) and WPHL-TV in Philadelphia, Pennsylvania on Channel 17 (FCC File Number BLCT-2611), the proposed land mobile operation will be restricted as follows:

Base station operation is permitted in the five boroughs of New York City and Nassau, Westchester and Suffolk Counties in New York, and Bergen County, New Jersey. Mobile operation is permitted in these counties and boroughs as well as outside these areas provided the distance from the Empire State Building (Geographic Coordinates: 40o 44' 54" N, 73^{0}59'10"W) does not exceed 48 kilometers (30 miles).

Co-Channel Television Protection For base stations to be located in the five boroughs that comprise the City of New York and other jurisdictions east of the Hudson River and Kill Van Kull, the maximum effective radiated power (ERP) will be limited to 225 watts at an antenna height of 152.5 meters (500 feet) above average terrain. Adjustment of the permitted power will be allowed provided it is in accordance with the "169 kilometer Distance Separation" entries specified in Table B or prescribed by Figure B of Section 90.309(a)(5) of the FCC Rules.

For base stations to be located west of the Hudson River, the maximum ERP will be limited to the entries specified in Table B or prescribed by Figure B of Section 90.309(a)(5) of the FCC Rules for the actual separation distance between the land mobile base station and the transmitter site of WNEP-TV, Scranton (Geographic Coordinates: 41^{0}10'58"N, 75^{0}52'21"W).

Mobile stations associated with such base stations will be restricted to 100 watts ERP in the area of operation extending eastward from the Hudson River and 10 watts ERP in the area of operation extending westward from the Hudson River. These restrictions offer 40 dB of protection to the Grade B coverage contour of WNEP-TV, Scranton.

Adjacent Channel Television Protection

The above parameters and conditions are considered to be sufficient to protect first-adjacent channel television station WPHL-TV, Philadelphia (Geographic Coordinates: 40^{0}02'30" N, 75^{0}14'24"W). Operation of mobile units within a radius of 48 kilometers (30 miles) from the Empire State Building would be no closer than 8 kilometers (5 miles) from the WPHL Grade B coverage contour. This will offer a 0 dB protection ratio to WPHL-TV.

Low Power Television Protection

LPTV station W17BM has no responsibility to protect land mobile operations on adjacent TV Channel 16 other than from spurious emissions. Land mobile licensees must correct, at their expense, interference caused by their operations to the reception of W17BM within its protected signal contour as defined in Section 74.707 of the FCC Rules.

Periodic Reports

The Joint Committee of broadcasters and public safety agencies -- as contemplated in the agreement -- will file annual reports with the Commission regarding the status of implementation and progress toward the development of new spectrum efficient systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Southwest Cable Television
Beverly Hills, California

CUID No. CA0457

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1995; Released: March 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Southwest Cable Television ("Century") was charging for its cable programming service ("CPS") tiers in Beverly Hills, California, CUID No. CA0457. Century has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Century's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76. Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely complaint was served on Century on September 1, 1993.[11] The Commission received the complaint on September 2, 1993. In response to the complaint, Century filed an FCC Form 393 on November 16, 1993.

5. Century states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier and a seven-channel CPS tier called the Satellite Tier, Century began offering twelve channels on an individual, or a la carte, basis. These a la carte channels could also be purchased collectively as one twelve-channel package (Century Select 12) or in two packages of six channels each (Century Select 6A and 6B). This restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Century in Beverly Hills and Los Angeles, California.[12] In the LOI order, we found that the retiering in Beverly Hills and Los Angeles constituted an evasion of rate regulation. We concluded that Century's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. Based upon this decision, and in response to our December 29, 1994 Public Notice,[13] Century filed an updated FCC Form 393 for

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Century has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Century implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).:

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed September 1, 1993 and states that it was mailed to Century on that date. Century has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider September 1, 1993 as the service date.

[12] *Century Southwest Cable TV, Beverly Hills and Los Angeles, California*, LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures With Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

Beverly Hills on February 7, 1995, in which it treated the twelve-channel package of a la carte channels as a CPS tier.[14]

6. On January 23, 1995, Century filed an Application for Review which argued that the Commission should reverse the Bureau's LOI decision regarding the treatment of its a la carte packages. Century then filed a motion on January 26, 1995 requesting the Bureau to defer action on the complaints pending against its CPS rates in Beverly Hills and Los Angeles until the Commission rules on the Application for Review.

III. DISCUSSION

7. In its amended benchmark filing of February 7, 1995, Century calculated a maximum permitted rate for the seven-channel Satellite Tier of $3.55 per month (plus franchise fee) and a maximum permitted rate for the Century Select 12 tier of $6.08 per month (plus franchise fee). Century did not, however, attempt to justify its monthly price of $4.00 for the Century Select 6A and 6B tiers. Upon review, we have determined that Century has not correctly calculated its maximum permitted per-channel rate, and it is therefore appropriate to make the following adjustments to Century's calculations in Form 393:

a. According to a supplemental schedule attached to its Form 393, Century's benchmark calculation for its regulated offerings as of September 1, 1993 (Form 393, Part II, Worksheet 1, Line 121) was based upon 61 regulated channels and 35 satellite channels. The channel line-up card effective September 1, 1993 assigns station KDOC to both channels 29 and 56. Because subscribers receive only one programming service over channels 29 and 56, Century cannot charge subscribers for these channels as separate units of cable service.[15] Accordingly, we reduced the total number of rate-regulated channels from 61 to 60. Century did not identify on the channel line-up card which of the regulated channels were delivered by satellite. Based upon our count, we found that there were 34 satellite channels instead of 35. This adjustment increases the benchmark channel rate entered on Line 121 of Worksheet 1.

b. Similarly, Century's benchmark calculation for its regulated offerings as of September 30, 1992 (Form 393, Part II, Worksheet 2, Line 220) is based upon 53 regulated channels and 35 satellite channels. We were able to verify the 53 regulated channels used for the benchmark calculation, but we were unable to verify Century's count of 35 satellite channels. Based upon our count, we reduced the number of satellite channels from 35 to 34. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

8. These adjustments have the cumulative effect of increasing the maximum permitted monthly price for the Century Select 12 tier to $6.18 per month (plus franchise fee). Century's actual monthly charge for the Century Select 12 tier was $6.00 (plus franchise fee). Therefore, Century has demonstrated that the actual charge for this twelve-channel tier was at or below the maximum permitted rate.

9. The same adjustments result in a maximum permitted rate for the seven-channel Satellite Tier of $3.61 per month (plus franchise fee) and a maximum permitted rate for the Century Select 6A and 6B tiers of $3.09 per month (plus franchise fee). Century's actual monthly charge for the seven-channel Satellite Tier was $3.82 (plus franchise fee). The actual monthly charge for the Century Select 6A and 6B tiers was $4.00 (plus franchise fee). Thus, Century has failed to demonstrate that its actual charges for the seven-channel Satellite Tier and for the Century Select 6A and 6B tiers were at or below the maximum permitted rates.

10. Depending upon the amount of allowable offsets, refunds may be owed to compensate subscribers for the overcharges described above. However, since the Commission's resolution of the issues pending in Century's Application for Review could require revisions to our analysis, we will stay the effective date of this Order in response to Century's motion until the Commission has issued its decision in that proceeding. Since interest charges on any required refunds will continue to accrue during the period of this stay, Century's subscribers in Beverly Hills will not be adversely affected.

IV. CONCLUSIONS

11. Upon review of the record herein, we conclude that, for the period from September 2, 1993, to May 14, 1994, Century's showing supports maximum reasonable CPS tier prices of $3.61 per month (plus franchise fee) for the seven-channel Satellite Tier, $6.18 per month (plus franchise fee) for the Century Select 12 tier, and $3.09 per month (plus franchise fee) for the Century Select 6A and 6B tiers.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amounts they paid in excess of a reasonable price for the CPS tiers.

12. We further conclude that Century must file an FCC Form 1200 rate filing for the period after May 14, 1994 which reflects the fact that Century's prices during the earlier period were unreasonable.[17] We reserve the right to

[14] The updated filing was also in response to a January 11, 1995 Commission letter from Julia Buchanan, FCC, to Seth Davidson, counsel for Century, which requested further clarification of Century's showing.

[15] *See Cox Cable Hampton Roads, Inc., Virginia Beach, Virginia,* CUID No. VA0166, DA 94-1288 (Cab. Serv. Bur., released Nov. 18, 1994).

[16] These findings are based solely on the representations of Century listed in paragraph 5, *supra,* and the modifications described in paragraph 7, *supra.* Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We note that Century has not yet filed a rate justification for its prices in effect after May 14, 1994.

make further adjustments to Century's prices for the period after May 14. 1994. upon completion of our review of Century's rate justification for that period.

13. We futher conclude that Century has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[18] As provided in the Public Notice, we will relieve Century of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

14. We further conclude that the effective date of this Order will be stayed until the Commission releases a decision on Century's Application for Review of the Bureau's LOI decision regarding the treatment of Century's a la carte packages in Beverly Hills and Los Angeles.

15. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 1, 1993 complaint against the cable programming service prices charged by Century Southwest Cable Television in Beverly Hills, California, CUID No. CA0457, and all other complaints relating to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

16. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television with respect to Beverly Hills, California, CUID No. CA0457, for the period of September 2, 1993 to May 14, 1994, justifies maximum prices of $3.61 per month (plus franchise fee) for the seven-channel Satellite Tier, $6.18 per month (plus franchise fee) for the Century Select 12 tier, and $3.09 per month (plus franchise fee) for the Century Select 6A and 6B tiers.

17. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Century Southwest Cable Television shall refund to subscribers for the period September 2, 1993[19] to May 14, 1994, that portion of the amounts paid for cable programming service that exceeded $3.61 per month (plus franchise fee) for the seven-channel Satellite Tier and $3.09 per month (plus franchise fee) for the Century Select 6A and 6B tiers and were thus unreasonable, offset by the amounts paid by subscribers during the same period for the Century Select 12 tier which were less than the maximum permitted price, plus interest to the date of the refund.

18. IT IS FURTHER ORDERED that Century Southwest Cable Television shall determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the effective date of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

19. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Century Southwest Cable Television shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

20. IT IS FURTHER ORDERED that Century Southwest Cable Television's motion to defer action on the complaints against its cable programming service prices in Beverly Hills, California, CUID No. CA0457, is resolved as indicated herein.

21. IT IS FURTHER ORDERED that the effective date of this Order will be stayed until the Commission releases a decision on Century Southwest Cable Television's Application for Review of the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[18] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company CUID No. CA0155
Lodi, CA

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Lodi, California, CUID No. CA0155. King has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of King's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. King asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in King's CPS tier price exceeding the maximum permitted price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by King Videocable Company in Lodi, California, CUID No. CA0155, IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company CUID No. MI0009

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Bresnan Communications Company ("Bresnan") was charging for its cable programming service ("CPS") tier in Tilden, Michigan, CUID No. MI0009. Bresnan has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Bresnan's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Bresnan asserts that its monthly CPS price is justified by its benchmark filing because this price is less than or equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Bresnan's CPS tier price exceeding the maximum permitted price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Bresnan Communications Company in Tilden, Michigan, CUID No. MI0009 IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Colony Cablevision of Southeastern Massachusetts, Inc.
New Bedford, MA — CUID No. MA0067

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Colony Cablevision of Southeastern Massachusetts, Inc. ("Colony") was charging for its cable programming service ("CPS") tier in New Bedford, Massachusetts, CUID No. MA0067. Colony has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Colony's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Colony asserts that its monthly CPS price is justified by its benchmark filing because this price is less than or equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Colony's CPS tier price exceeding the maximum permitted price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Colony Cablevision of Southeastern Massachusetts, Inc. in New Bedford, Massachusetts, CUID No. MA0067, IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company	CUID Nos. MN0271, MN0279, MN0280, MN0291, MN0292, MN0293, MN0294, MN0307, MN0311

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Brooklyn Center, Minnesota, CUID No. MN0279; Brooklyn Park, Minnesota, CUID No. MN0271; Crystal, Minnesota, CUID No. MN0292; Golden Valley, Minnesota, CUID No. MN0294; Maple Grove, Minnesota, CUID No. MN0311; New Hope, Minnesota, CUID No. MN0291; Plymouth, Minnesota, CUID No. MN0307; Robbinsdale, Minnesota, CUID No. MN0293; and Osseo, Minnesota, CUID No. MN0280. King has chosen to attempt to justify its price through a benchmark showing on one FCC Form 393. This Order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in Brooklyn Center, Minnesota, CUID No. MN0279; Brooklyn Park, Minnesota, CUID No. MN0271; Crystal, Minnesota, CUID No. MN0292; Golden Valley, Minnesota, CUID No. MN0294; Maple Grove, Minnesota, CUID No. MN0311; New Hope, Minnesota, CUID No. MN0291; Plymouth, Minnesota, CUID No. MN0307; Robbinsdale, Minnesota, CUID No. MN0293; and Osseo, Minnesota, CUID No. MN0280 were completed and served on King[11] and received by the Commission on December 27, 1993.

5. King attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993 in response to the franchising authority's initial complaints. King amended its justification on June 24, 1994 in response to a Cable

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in King's price for the period after May 14, 1994 may be required to reflect the fact that King's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Northwest Suburbs Cable Communications Commission, the consolidated local franchising authority for all nine areas, was the only complainant. Its original complaints were filed with the FCC on October 18, 1993, but were returned by the Commission pursuant to 47 C.F.R. § 76.954. It refiled corrected complaints on December 27, 1993, but did not specify the date that it served copies of the amended complaints on King. Furthermore, King did not comply with 47 C.F.R. § 76.956(a), which requires it to state when the complaints were served upon it. Under these circumstances, we will consider the filing date as the service date.

Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings,[13] and on February 1 and 14, 1995, in response to inquiries by Commission staff.

III. DISCUSSION

6. In its amended benchmark filings of January 24, 1995, King calculated a maximum permitted price for the CPS tier of $10.79 per month.[14] However, King's actual price for the CPS tier was $10.95 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of King's FCC Form 393, we have found the following error that requires a recalculation of King's maximum permitted CPS price:

> a. In Column G of Schedules A and C of Part III of its FCC Form 393, King did not correctly account for its income tax expense. By placing entries in these columns, King confirms that it is a tax-paying entity (i.e., a "C" corporation). However, King incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[15] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

7. This adjustment has the effect of reducing the maximum permitted monthly CPS tier price from $10.79 (as King calculated) to $10.77.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $10.77 per month (plus franchise fee) for the period December 27, 1993 to May 14, 1994.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that King must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that King's price during the earlier period was unreasonable.[17] We reserve the right to make further adjustments to King's price for the period after May 14, 1994, upon completion of our review of King's FCC Form 1200 rate filing.

10. We further conclude that King has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[18] As provided in the Public Notice, we will relieve King of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 27, 1993 complaints against the cable programming service price charged by King Videocable Company in Brooklyn Center, Minnesota, CUID No. MN0279; Brooklyn Park, Minnesota, CUID No. MN0271; Crystal, Minnesota, CUID No. MN0292; Golden Valley, Minnesota, CUID No. MN0294; Maple Grove, Minnesota, CUID No. MN0311; New Hope, Minnesota, CUID No. MN0291; Plymouth, Minnesota, CUID No. MN0307; Robbinsdale, Minnesota, CUID No. MN0293; and Osseo, Minnesota, CUID No. MN0280 ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by King Videocable Company with respect to Brooklyn Center, Minnesota, CUID No. MN0279; Brooklyn Park, Minnesota, CUID No. MN0271; Crystal, Minnesota, CUID No. MN0292; Golden Valley, Minnesota, CUID No. MN0294; Maple Grove, Minnesota, CUID No. MN0311; New Hope, Minnesota, CUID No. MN0291; Plymouth, Minnesota, CUID No. MN0307; Robbinsdale, Minnesota, CUID No. MN0293; and Osseo, Minnesota, CUID No. MN0280, for the period of December 27, 1993 to May 14, 1994, justifies a maximum price of $10.77 per month (plus franchise fee) for the cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that King Videocable Company shall refund to subscribers that

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[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[14] King recalculated its inflation adjustment in its January 24, 1995 amendments in accordance with the principles set out in the Public Notice.

[15] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")*

[16] This finding is based solely on the representations of King listed in paragraph 5, *supra*, and the modification described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We reviewed King's Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[18] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

portion of the amounts paid for cable programming service in each franchise area from December 27, 1993[19] to May 14, 1994, that exceeded $10.77 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that King Videocable Company shall promptly determine the overcharges to CPS subscribers for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing for CUID Nos. MN0271, MN0279, MN0280, MN0291, MN0292, MN0293, MN0294, MN0307 and MN0311 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price (plus franchise fee).

16. IT IS FURTHER ORDERED that King Videocable Company shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for CUID Nos. MN0271, MN0279, MN0280, MN0291, MN0292, MN0293, MN0294, MN0307 and MN0311 that reflects the reduction in the CPS rate determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that King Videocable Company shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

[19] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Copley/Colony Cablevision of Costa Mesa, Inc. — CUID No. CA1173

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1995; Released: March 2, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Copley/Colony Cablevision of Costa Mesa, Inc. ("Colony") was charging for its cable programming service ("CPS") tier in Costa Mesa, California, CUID No. CA1173. Colony has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Colony's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in Costa Mesa, California, CUID No. CA1173, was completed and served on Colony on December 21, 1993 and received by the Commission on December 28, 1993.

5. Colony attempted to justify its CPS price through an FCC Form 393 filed on January 24, 1994. Colony amended its justifications on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] on January 6, 1995 in response to an inquiry by Commission staff, and on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filing of January 6, 1995, Colony calculated a maximum permitted price for the CPS tier of $8.96 per month. Upon review of Colony's filing, as amended, we have found no apparent errors that would require a recalculation of Colony's maximum permitted CPS price. However, Colony's actual price for the CPS tier was $9.07 per month. Thus, Colony has failed to demonstrate that its price for the CPS tier was not unreasonable.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Colony has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Colony implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Colony's price for the period after May 14, 1994 may be required to reflect the fact that Colony's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Colony's showing supports a maximum reasonable CPS tier price of $8.96 per month (plus franchise fee) for the period December 28, 1993 to May 14, 1994.[13]

8. We further conclude that Colony must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Colony's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to Colony's price for the period after May 14, 1994, upon completion of our review of Colony's FCC Form 1200 rate filing.

9. We further conclude that Colony has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve Colony of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 21, 1993 complaint against the cable programming service price charged by Copley/Colony Cablevision of Costa Mesa, Inc. in Costa Mesa, California, CUID No. CA1173 IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Copley/Colony Cablevision of Costa Mesa, Inc. with respect to Costa Mesa, California, CUID No. CA1173, for the period of December 28, 1993 to May 14, 1994, justifies a maximum price of $8.96 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Copley/Colony Cablevision of Costa Mesa, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from December 28, 1993[16] to May 14, 1994, that exceeded $8.96 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Copley/Colony Cablevision of Costa Mesa, Inc. shall promptly determine the overcharges to CPS subscribers for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Copley/Colony Cablevision of Costa Mesa, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing for Costa Mesa, California, CUID No. CA1173 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Copley/Colony Cablevision of Costa Mesa, Inc. shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for Costa Mesa, California, CUID No. CA1173 that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Copley/Colony Cablevision of Costa Mesa, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

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[13] This finding is based solely on the representations of Colony listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed Colony's Form 1200 rate filing and confirmed that Colony calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[16] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 24, 1995

Released: February 24, 1995

IN REPLY REFER TO:
DA 95-359

Christopher W. Savage, Esq.
Counsel for United Video Cablevision, Inc.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Dear Mr. Savage:

This letter is in reference to your letter on behalf of United Video Cablevision, Inc. ("United Video") dated February 16, 1995, with respect to a complaint filed November 26, 1993, against the price United Video was charging for cable programming service in the Village of Melrose, New Mexico, CUID No. NM0112. In that letter, you state that United Video is not required to justify its rates prior to May 15, 1994, because United Video's Melrose, New Mexico system has only 246 subscribers. Based on the information you have provided, it appears that the Melrose system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), and was therefore exempt from rate regulation until May 15, 1994.

You further state that United Video did not timely respond to the rate complaint because United Video did not receive a copy of the complaint, and therefore it was not aware that a rate complaint had been filed. We note that the Village of Melrose indicated on FCC Form 329 that it served a copy of the complaint on United Video on October 12, 1993. Nonetheless, under the circumstances we will accept as timely United Video's filing in response to this rate complaint no later than within 30 days of the date it received notice of the complaint.

We will rule at a later date on United Video's justification under the Commission's revised rate regulations of its cable programming service rates in Melrose beginning May 15, 1994. At that time, we will also consider United Video's argument that the complaint is deficient on its face.

Should you have any questions regarding this matter, please contact Peter G. Wolfe at (202) 739-0783.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

cc: Village of Melrose

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co.;	USP-93-W-056
MCI Telecommunications Corp.	USP-93-W-057

Petitions for Waiver of the International Settlements Policy for a Change in the Accounting Rate for Switched Voice Services with Mexico.

ORDER ON RECONSIDERATION

Adopted: April 19, 1995; Released: April 26, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. Telefonos de Mexico, S.A. de C.V., ("Telmex") seeks reconsideration of an order which denied the requests of AT&T and MCI to increase the settlement rates paid to Telmex for country direct services.[1] Settlement rates in Mexico are already much too high, and Telmex has not demonstrated a cost-based justification for this increase. Since we find no other reason to allow such a settlement rate increase, Telmex's Petition for Reconsideration is denied.

II. BACKGROUND

2. AT&T and MCI sought waivers of the Commission's International Settlements Policy (ISP) to introduce their country direct services (USADirect and CALL USA, respectively) throughout Mexico at settlement rates of $.35 per minute for Rate Bands 1-3 and $1.20 per minute for Rate Bands 4-8 (effective 12/1/92 through 12/31/93). On June 4, 1993, the International Facilities Division of the Common Carrier Bureau ("Division") denied AT&T's and MCI's waiver requests.[2] AT&T, MCI and Sprint filed statements in support of Telmex's petition.[3] No opposition to Telmex's petition has been filed.

III. DISCUSSION

3. Telmex did not participate in the underlying proceeding. It asserts, however, that Section 1.106 of the Commission's Rules permits a person adversely affected by a Commission action to seek reconsideration if it has shown "good reason why it was not possible for him to participate in the earlier stages of the proceeding."[4] We need not decide whether Telmex has satisfied this standard, because the magnitude of the settlements payments to Mexico and the unique complexity of the Mexican settlement rate structure are such that the public interest requires us to address the issues raised by Telmex.[5]

4. In denying AT&T's and MCI's waiver requests, the Division found that the proposed settlement rates would contravene the Commission's ISP,[6] noting that: 1) the rates were higher than the existing rates for the USADirect service available in Rate Band 8,[7] 2) the carriers failed to show that the proposed rates would improve the settlements deficit with Mexico, or would otherwise be in the public interest, and 3) the carriers made no attempt to justify these proposed rates on a cost basis.[8]

5. Telmex's main argument on reconsideration is not that the proposed settlement rates for USADirect and Call USA are consistent with the ISP, but that an exception to the ISP is warranted.[9] In support, Telmex asserts that its efforts to restructure Mexico's telecommunications infrastructure justify a departure from the ISP. Telmex asserts generally that it is upgrading its telecommunications infra-

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[1] *In the Matter of American Telephone and Telegraph Company and MCI Telecommunications Corp.* USP-93-W-056, USP-93-W-057, 8 FCC Rcd 3901 (Int. Fac. Div. 1993) ("Order"). *See infra,* note 2.

[2] Authority formerly delegated to the Common Carrier Bureau to grant such waivers now rests with the International Bureau. *See generally, Amendment of Parts 0,1,25,43,64 and 73 of the Commission's Rules to Reflect a Reorganization Establishing the International Bureau,* 9 FCC Rcd 7050 (1994).

[3] *See* Letter, dated July 21, 1993, from Michael B. Fingerhut, Sprint to William F. Caton, Acting Secretary, Federal Communications Commission (*"Sprint Letter"*); Letter dated July 23, 1993, from Stephen C. Garavito, AT&T to William F. Caton, Acting Secretary, Federal Communications Commission (*"AT&T Letter"*); Letter, dated July 14, 1993 from Jodi L. Cooper, MCI to William F. Caton, Acting Secretary, Federal Communications Commission (*"MCI Letter"*).

[4] *Telmex Petition* at pp. 2,3.

[5] *C.f., In Re Application of Central Mobile Radio Phone Service* 65 F.C.C.2d 648 (1977); *In Re Application of Cable Television of Puerto Rico, San Juan Puerto Rico* 49 F.C.C. 2d 617 (1974).

[6] The ISP requires uniform settlement rates, accounting rates and division of tolls for U.S. international carriers on parallel routes. It encourages accounting rate reductions by U.S. carriers in an effort to address concerns over the rapidly increasing settlements deficit incurred by the United States vis-a-vis the rest of the world. *See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes,* 51 Fed. Reg. 4736 (1986); *recon.* 2 FCC Rcd 1118 (1987); *fur. recon.* 3 FCC Rcd 1614 (1988).

[7] While MCI's waiver request proposed to provide CALL USA for the first time, the proposed settlement rate is still considered an increase under the ISP because the proposed rate is higher than the rate previously offered to AT&T for its USADirect service. 47 C.F.R. §64.1001 (b).

[8] *Order* at ¶ ¶ 9-16. In its Order, the Division noted that, because the settlement rates paid by AT&T for USADirect service in Rate Band 8 are the same for dial traffic originating in the U.S. and terminating in Rate Band 8, the carriers would "be hard pressed, on the basis of cost, to justify the introduction of a settlement rate for USADirect which is higher than the rate for dial traffic," even had they attempted to do so. *Order* at ¶ 12.

[9] *Telmex Petition* at pp. 3-10; *see also Sprint Letter,* at pp. 1,2; *MCI Letter* at pp. 2,3.

structure, adjusting prices to reflect cost, and introducing competition. Telmex therefore would have us deviate from the principle that settlement rates should reflect cost.

6. We support Telmex's efforts to align its pricing structure more closely to cost, but the proposed settlement rates for USADirect and CALL USA would depart from these efforts. We also do not believe that Telmex has shown that this settlement rate increase for country direct services is essential to its efforts to upgrade its infrastructure. If general assertions that rates increases support infrastructure development and a transition to a more competitive environment sufficed to justify a waiver of the ISP, it would be difficult to deny waivers. The ISP could be eviscerated. Mexico already receives the largest net settlement payments based upon settlement rates that are not justified by cost.[10]

7. Further, it is our understanding that the improvements and realignments in Telmex's communications infrastructure include investment in technologically advanced equipment -- the presence of which has resulted in the increased availability of telecommunications service throughout Mexico. These factors should lower the unit cost of providing service, and permit lower settlement rates. However, the settlement rates for U.S. billed calls to Mexico that expired December 31, 1994 are among the highest rates U.S. carriers have with any foreign administration. We note the U.S. carriers' ongoing settlement rate negotiations with Telmex and hope that they will produce *significantly* reduced rates.

8. We reject Telmex's argument, initially advanced by AT&T and MCI, that because country direct services are a substitute for Mexican operator assisted service, the proposed settlement rate is an "increase" only if it is higher than those settlement rates applicable to operator assisted calls.[11] The question of whether the proposed settlement rate for country direct service has increased is better resolved by reference to the previous settlement rate applied to USADirect service than by reference to the settlement rate applied to a different service with different costs.[12] For example, the cost to Telmex of a service utilizing a Mexico-based operator employed by Telmex obviously differs from the cost to Telmex that is associated with a country direct call -- where a U.S. (not Mexican) operator is used to complete the call.

9. Telmex next argues that the Division acted unreasonably in comparing the proposed settlement rates to the existing settlement rates for USADirect service because reliance on such comparisons will "discourage foreign carriers from implementing new services with U.S. Carriers... in the future." *Telmex Petition* at p.9,n.12. However, we routinely rely on such comparative data. In fact, our rules require that such data accompany any proposed change in accounting rates. 47 C.F.R. § 64.1001(e)(f). Moreover, Telmex has submitted no evidence to support this argument. In addition, this position also directly contravenes the ISP and the waiver standard established by the Commission in the *Phase I Report and Order*.[13]

10. Finally, Telmex argues that, if the record contains no evidence of whipsawing, and "proposed rates are not higher than rates for like services currently in effect," the burden of proof shifts to the Commission to justify its refusal to permit the proposed change.[14] We find that the proposed rates are, in fact, higher than rates for like services currently in effect.[15] As the Division noted in its Order, in 1992 AT&T paid a settlement rate of $1.10 per minute (day) and $.74 per minute (night) for the USADirect services available from four cities located in Rate Band 8.[16] Thus, the proposed settlement rate of $1.20 per minute (Rate Bands 4-8) is clearly an increase which Telmex has not justified based on underlying costs. Moreover, Telmex's argument that the burden of proof somehow shifts in the circumstances it cites is unsupported by any authority. Even in the absence of whipsawing, the burden remains with the party seeking waiver.[17]

11. We recognize that Mexico has taken significant strides to introduce competition into its telecommunication market, and also to move calling prices more in line with costs. However, non-cost-based increases in the settlement rates would undermine these efforts, and are inconsistent with the ISP.

IV. CONCLUSION

12. For the reasons stated above, we deny Telmex's Petition for Reconsideration.

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[10] Between 1985 and 1993, the U.S. net settlements payment to Mexico totaled $4.3 billion. In 1993 alone Telmex received $720 million, five times more than the second largest payment. *Trends in the International Telecommunications Industry Through 1992*, Industry Analysis Division (IAD), FCC, March 1994 (1985-1992 data); 1993 Section, 43.61 International Telecommunications Data, IAD, FCC, November 21, 1994 (1993 data). The average settlement payment per minute for U.S. billed telephone service to Mexico in 1993 was 65¢/minute. This compares with an average rate of 15¢/minute for calls to Canada, and with a global average of 55¢/minute. 1993 Section, 43.61 International Telecommunications Data, IAD, FCC, November 21, 1994. As stated in the Division's Order, we have seen no persuasive evidence that implementing the proposed settlement rates for country direct services would decrease net payments to Mexico. *Order*, at *p.4*, nn.26, 27.

[11] *Telmex Petition* at p.10,n.14; *AT&T Letter* at pp. 2,3. AT&T unpersuasively restates this argument in its letter supporting Telmex's Petition for Reconsideration. *AT&T Letter* at pp. 2,3. However for the reasons stated in ¶ 8, *infra*, we continue to reject this argument. In its letter, AT&T also restates its position that the proposed settlement payments for USADirect would result in a decrease in net settlement payments to Mexico, and would benefit U.S. citizens in Mexico. *AT&T Letter* at pp. 1-3; *see also MCI Letter* at pp. 2,3. We also reject these arguments for the reasons set forth in the Order. *Order* at ¶ ¶ 14,15,n.27.

[12] *See e.g., Telefonica* at ¶ 18.

[13] Telmex also argues that the facts of this case differ from those in *American Telephone and Telegraph Company and MCI Communications Corporation*, 5 FCC Rcd 4618 (Com. Car. Bur. 1990) *(Telefonica)*, where the Common Carrier Bureau found that the proposed accounting rate increases did not serve the public interest. It thus argues that it was improper for the Division to cite that case here. However, the Division merely cited *Telefonica* as an example of the general policy that the accounting rate increases are not in the public interest.

[14] *Telmex Petition* at p.11.

[15] *Order* at ¶ ¶ 8-16.

[16] *Order* at n.7

[17] *See, e.g., Phase I Report and Order*, 6 FCC Rcd at 3554-5.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Telmex IS DENIED.

14. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

Diversified Communications CSR-4015-A
Florence/Myrtle Beach, South Carolina

For Modification of Station
WPDE-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 26, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Diversified Communications ("WPDE-TV"), licensee of Station WPDE-TV (ABC, Channel 15), Florence/Myrtle Beach, South Carolina, has filed the above-captioned petition for special relief requesting the Commission to modify its television market for purposes of establishing must-carry rights to include the Robeson County, North Carolina communities of Lumberton, Rowland, Red Springs, Lumber Bridge, St. Pauls, Fairmont and Pembroke within the Florence/Myrtle Beach, South Carolina "area of dominant influence" ("ADI"). The petition is unopposed.

BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in Docket 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory signal carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

[5] 47 U.S.C. §534(h)(1)(C)(ii).

* * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in its *Report and Order, MM Docket 92-259, supra,* to aid decision making in these matters:

> For example, the historical carriage of the stations could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis, rather than a county-by-county basis, and that they should be treated as specific to particular stations, rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for an increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obligated to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.,* when it has used up the channel capacity mandated for broadcast signal carriage, or determined which of duplicating stations are entitled to carriage priority.

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue here are all located in Robeson County, North Carolina which is located within the Wilmington, North Carolina ADI. The Florence-Myrtle Beach ADI consists of six counties and the communities here in question are located immediately to the north of the ADI.

9. In support of its petition, WPDE-TV states that Robeson County cable systems have historically carried its signal. Specifically, WPDE-TV states that its signal is carried on the two cable systems serving the Robeson County communities of Lumberton and Rowland. WPDE-TV argues that because the communities at issue here are not in the Florence/Myrtle Beach ADI, it does not enjoy must carry status on the respective cable systems, and is, therefore, subject to having its signal deleted. Apparently, in 1981, WPDE-TV's signal was dropped from the cable system serving Lumberton and was only reinstated after the City Counsel, citing the quality local service provided by WPDE-TV to Lumberton and Robeson County, formally requested that WPDE again be carried. WPDE-TV has been continuously carried by the cable companies serving Lumberton since 1990 and in Rowland since 1985. Furthermore, WPDE-TV argues that the continuing absence of its signal from cable systems serving Red Springs, Lumber Bridge, St. Pauls, Fairmont and Pembroke only serves to deprive residents of desired local programming.

10. In order to show that it provides coverage and other local service to Robeson County, WPDE-TV states that its Grade A contour encompasses the vast majority of Robeson County while its Grade B contour engulfs the remaining area of the county. Moreover, WPDE-TV states that its Grade A contour covers all of the communities that it requests to be included in its television market. WPDE-TV also states that no commercial station in the Wilmington, North Carolina ADI, in which the communities at issue are located, provides a more encompassing Grade A contour over the county and, therefore, this demonstrates the station's ability to provide superior quality coverage to the communities in question.

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6 H.R. Rep. 102-628, 102nd Cong., 2nd Sess. at 97 (1992).
7 8 FCC Rcd at 2977 (emphasis in original).
8 *MM Docket No.* 92-259, 8 FCC Rcd at 2977, n.139.
9 47 C.F.R. §76.59.
10 *MM D ocket No.* 92-259, 8 FCC Rcd at 2981.

11. WPDE-TV also maintains that it provides extensive news and sports coverage in Robeson County. WPDE-TV states that it reports virtually every night from Lumberton, the largest community in the county. Moreover, WPDE-TV notes that it staffs its Lumberton News Center with a full time reporter who reports only on Robeson County news, sports and other events. According to WPDE-TV, the CBS affiliate in Florence, WBTW-TV, also has a news bureau in Lumberton while only one station in the Wilmington ADI has a news bureau in the community. WPDE-TV contends that this further demonstrates that television stations in Florence consider Robeson County as part of their television market.

12. With regard to evidence of viewing patterns in cable and noncable households, WPDE-TV argues that Robeson County viewers clearly prefer watching television stations broadcasting from nearby Florence over stations broadcasting from the more distant Wilmington area.[11] In support, WPDE-TV submits a "Robeson County share of viewing" exhibit which it says demonstrates that the most recently available Arbitron research shows that Florence stations won a 31 share versus Wilmington's 28.2 share for the month of February 1993. Moreover, WPDE-TV states that these ratings show that twice as many Robeson County viewers prefer watching the Florence ABC affiliate - WPDE-TV - (6.2 share) over the Wilmington ABC affiliate - WWAY-TV-(2.8 share). In another exhibit, WPDE-TV tries to show in a survey limited to cable households that when residents have a choice, they prefer watching Florence television stations. WPDE-TV states that Arbitron research reveals that the two affiliates in Florence (WPDE-TV, an ABC affiliate and WBTW-TV, a CBS affiliate) have a nine share total. WPDE-TV submits that while the total share for Wilmington's three network affiliates is higher, the number drops to six if the NBC affiliate is not counted. According to WPDE-TV, while the viewership for WECT-TV, the NBC affiliate in Wilmington, is high, this number is not significant because Florence does not have an NBC affiliate, and is therefore unable to compete with WECT-TV for Robeson County viewers who may prefer NBC programming. With regard to noncable households, WPDE-TV advances the same argument. It states that the two network affiliates in Florence reap an overall share of 39 among noncable households in Robeson County. While the three Wilmington affiliates garner a 41 share, WPDE-TV argues that without the NBC affiliate the overall share would drop to five.

ANALYSIS AND DECISION

13. WPDE-TV's unopposed petition is consistent with the applicable standards and will be granted. We note at the outset that each of the applicable standards do not apply to each of the communities equally. However, considering the totality of the circumstances in this case, we believe that the aforementioned North Carolina communities should be considered as part of the Florence/Myrtle Beach ADI. WPDE-TV has shown Grade A coverage to the vast majority of Robeson County, while its Grade B covers the remaining communities. We have previously stated that this is sufficient to demonstrate coverage or other local service.[12] WPDE-TV has also demonstrated a long history of carriage on the cable systems serving the communities of Lumberton and Rowland. While this carriage has not been demonstrated for the remaining communities, we believe that WPDE-TV's signal strength, general commitment to local service in Robeson County, and sizable off-air viewership, as noted below, warrant that these communities be included in the Florence/Myrtle Beach ADI.

14. WPDE-TV has not provided information as to a lack of specific coverage of local events, sports or news in these communities by other stations presently eligible to assert mandatory carriage rights on cable systems serving these communities. However, WPDE-TV does state that it staffs a News Center in Lumberton with a full time reporter who reports on local events, as does another Florence affiliate, while only one station in the Wilmington ADI has a news bureau in the community. With regard to this criterion, however, we do not believe that Congress intended it to act as a bar to a station's ADI claim if it were to be shown that other stations serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. And finally, WPDE-TV has presented evidence of widespread cable and noncable household viewing patterns for Robeson County.[13] In this regard, we note that WPDE-TV captures over double the share of the Wilmington ADI ABC network affiliate.

ORDER

15. In view of the foregoing, we find that grant of WPDE-TV's petition is in the public interest.

16. Accordingly, IT IS ORDERED, pursuant to §614(h)(1)(c) of the Communications Act of 1934, as amended, 47 U.S.C. §534, and §76.59 of the Commission's Rules, 47 C.F.R. §76.59, that the captioned petition for special relief filed July 30, 1993 by Diversified Communications IS GRANTED.

17. IT IS FURTHER ORDERED, That this change shall be effective in accordance with the following schedule: WPDE-TV shall notify the cable systems in question in writing of its carriage and channel position elections (§§76.56, 76.57 and 76.64(f) of the Commission's Rules) within 30 days of the release date of the *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of such notification.

18. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

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[11] The distance between Florence and Lumberton is 52 miles, while the distance between Wilmington and Lumberton is 67 miles.

[12] *MM Docket 92-259*, 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.

[13] This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, channel capacity, and program duplication. *See* paragraph 7, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-317

In the Matter of

KEYBOARD BROADCASTING COMMUNICATION

Licensee of Station WCSA(AM)
Ripley, Mississippi

Order to Show Cause Why the License for Station WCSA(AM) Ripley, Mississippi Should Not Be Revoked

ORDER

Adopted: April 17, 1995; Released: April 26, 1995

By the Chief, Mass Media Bureau:

1. This proceeding began on December 29, 1993, when the Mass Media Bureau released its *Order to Show Cause and Hearing Designation Order,* 9 FCC Rcd 101 (1993) (*"OSC"*) directing Keyboard Broadcasting Communication ("Keyboard") to show cause why the license for WCSA(AM) Ripley, Mississippi, should not be revoked. The Bureau noted that the Commission's records showed that the station had been off the air since September 1, 1991, and that the licensee's last request to remain silent had been granted through July 16, 1993. In light of that record, the Bureau specified issues for hearing to determine whether Keyboard has the capability and intent to expeditiously resume broadcast operations of WCSA(AM) and whether Keyboard violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.[1] The Bureau also specified an issue to determine whether, in light of the evidence adduced, Keyboard's license should be revoked. By *Order,* FCC 94M-62, released February 7, 1994, Administrative Law Judge Walter C. Miller, terminated the hearing proceeding because, *inter alia,* Keyboard failed to properly file its notice of appearance and because he concluded that WCSA(AM) was incapable of expeditiously resuming operation. Pursuant to Section 1.92 of the Commission's Rules, the Judge also certified the case to the Commission.

2. On February 22, 1994, Keyboard filed a petition for reconsideration of the Judge's termination of the proceeding and certification of the case to the Commission. In its petition, Keyboard represented that it had taken "important affirmative steps to bring WCSA into FCC compliance." According to Keyboard, it had resolved its differences with the owner of the property on which its antenna was located, prepared equipment for resumption of broadcast activities and ensured that necessary financing was available. Keyboard requested, in its petition and related documents, that it be afforded 90 days, commencing March 15, 1994, in which to resume WCSA(AM) broadcast operations. Finally, Keyboard explained that it had been unable to resume operations at an earlier date because of the poor state of the station equipment when it had acquired the station in 1991, damage done to its transmitting tower in 1992 when it was struck by lightening and the difficulty Keyboard had experienced in securing its right to use the premises on which its transmitter was located. By *Memorandum Opinion and Order,* FCC 94M-106, released March 1, 1994, the Presiding Judge denied Keyboard's petition for reconsideration.

3. In accordance with Section 1.92(d) of the Commission's Rules, the Bureau, acting pursuant to delegated authority,[2] reviewed the record before the ALJ. Based on this review, the Bureau sent Keyboard a letter of inquiry dated April 1, 1994, requesting that Keyboard provide information and documentation establishing its ability to resume WCSA(AM) broadcast operations within 90 days. In response to that letter, Keyboard, on April 14, 1994 and on May 12, 1994, provided the Bureau with information establishing that it had, *inter alia,* prepaid rent on its antenna and studio site, prepaid hazard insurance and obtained the services of an engineer to assist in preparing WCSA(AM)'s equipment for the resumption of operation. In addition, WCSA(AM) provided documents establishing that it had opened a bank account and deposited therein sufficient funds to return WCSA(AM) to the air. By further letter dated June 10, 1994, Keyboard informed the Bureau that on June 4, 1994, WCSA(AM) had resumed broadcast operations, but that Keyboard had been compelled to terminate WCSA(AM)'s operations because of an equipment prob-

[1] Section 73.1740(a)(4) provides:

In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[2] In those cases where the Administrative Law Judge has certified a case to the Commission pursuant to Section 1.92 of the Commission's Rules, the Mass Media Bureau has been given the authority to determine whether an Order of Revocation should issue. *See Radio Northwest Broadcasting Company,* 4 FCC Rcd 596, n.3 (1989).

lem. By letter dated July 4, 1994, Keyboard informed the Bureau that the problem had been resolved and that WCSA(AM) had again resumed broadcast operations. Information periodically provided to the Bureau by Keyboard indicates that WCSA(AM) has been in continuous operation since July 4, 1994.

4. Based on the facts of this case, particularly the substantial efforts and resources expended by Keyboard to return WCSA(AM) to the air and the successful resumption of and continuing operation of WCSA(AM) since July 4, 1994, the Bureau, on delegated authority, concludes that, pursuant to Section 1.92(d) of the Rules, this proceeding should be terminated without further action.

5. ACCORDINGLY, IT IS ORDERED, that this proceeding IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

DeSoto Broadcasting, Inc. CSR-3899-A
Venice, Florida

For Modification of Station
WBSV-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1995; Released: April 27, 1995

By the Cable Services Bureau:

INTRODUCTION

1. DeSoto Broadcasting, Inc. ("DeSoto Broadcasting" or "WBSV-TV"), licensee of Station WBSV-TV (Ind., Channel 62), Venice, Florida, has filed the above-captioned petition for special relief seeking to include cable communities in Charlotte County,[1] Lee County,[2] DeSoto County,[3] and Manatee County,[4] Florida (collectively known as "the Communities") within the Sarasota, Florida "area of dominant influence" (ADI) for the purpose of obtaining carriage under the Commission's cable television mandatory broadcast signal carriage rules. WTOG-TV, Inc. ("WTOG"), licensee of Television Broadcast Station WTOG (Ind., Channel 44), St. Petersburg, Florida, and FCVS Communications ("FCVS" or "WEVU"), licensee of Television Broadcast Station WEVU (ABC, Channel 26), Naples, Florida, filed oppositions to the petition for special relief. WBSV-TV filed a reply to the oppositions.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][5] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[6] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[7] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[8]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section

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[1] In Charlotte County the cable communities are those served by Storer Cable TV of Florida, Inc., serving Port Charlotte, unincorporated areas of Charlotte County, Punta Gorda, Windmill Village and Rotunda; Cable Two, Inc., serving unincorporated areas of Charlotte County; Sunstate Cable Systems, Inc., serving Lake Suzy Apartments and Newport Apartments; and Cablevision of Cape Coral, serving Punta Gorda.

[2] The cable communities in Lee County are those served by Storer Cable TV of Florida Inc., which serves Boca Grande, Lemon Bay Isles, Rotunda in Charlotte County and unincorporated areas of Englewood (half in Sarasota County and half in Charlotte County).

[3] In DeSoto County the cable communities are those served by Storer Cable TV of Florida, Inc., serving Arcadia, portions of DeSoto County and unincorporated areas of the county; USA Cablesystems, Inc., serving East Arcadia; Telesat Cablevision, Inc., serving Arcadia and unincorporated areas of DeSoto County; and Sunstate Cable Systems, Inc., serving portions of DeSoto County.

[4] The cable communities are those served by Paragon Communications, serving Bradenton, Anna Maria, Bradenton Beach, Holmes Beach, and northern portions of Manatee County; Universal Cablevision, serving Bradenton; Cablevision Industries of Florida, serving Ellenton, northern portions of Manatee County, Palmetto, and Parrish; and Storer Cable TV of Florida, Inc., serving Longboat Key (portions of which are in Sarasota County) and portions of Manatee County.

[5] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[6] 8 FCC Rcd 2965, 2976-2977 (1993).

[7] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[8] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[9]

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[10]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[11]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[12] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[13]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[14] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.,* when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The Florida communities that WBSV-TV seeks to add to its ADI are located in DeSoto and Manatee Counties, which are in the Tampa-St. Petersburg, Florida ADI, and in Charlotte and Lee Counties, which are in the Fort Myers-Naples, Florida ADI. WBSV-TV is located in Sarasota County, which, standing alone, comprises the Sarasota ADI. Manatee, DeSoto and Charlotte Counties are adjacent to Sarasota County, and Lee County is immediately south of Charlotte County. Virtually all of the communities in question are covered by WBSV-TV's predicted Grade B contour.

9. In support of its petition, DeSoto Broadcasting states that WBSV-TV has been on the air since May 1991, and has been carried on Storer Cable TV's Englewood cable system located in Sarasota, Charlotte, and Lee Counties and

[9] 47 U.S.C. §534(h)(1)(C)(ii).
[10] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[11] *Id.* at 2977 (emphasis in original).
[12] *MM Docket No. 92-259,* 8 FCC Rcd at 2977, 2977 n.139.
[13] 47 C.F.R. §76.59.
[14] *MM Docket No. 92-259,* 8 FCC Rcd at 2981.

Paragon Communication's Bradenton cable system located in Manatee County since 1991. WBSV-TV asserts that due to its short on-air history and the difficulties UHF independent stations traditionally face, the focus on historic carriage is better placed on a similarly situated station. WBSV-TV points to WWSB (ABC, Channel 40), Sarasota, Florida as a similarly situated station that has a history of carriage on all of the systems at issue. WBSV-TV notes that it places a Grade B or better service contour over almost all of the communities at issue. WBSV-TV asserts that it broadcasts news, sports, and local charitable events of interest to the Communities. Moreover, WBSV-TV provides closed captioned news which is not provided by other area stations and alleges that approximately 20 percent of Charlotte County need such assistance. WBSV-TV states that it has spent substantial sums on advertising and marketing its station in the communities at issue. With regard to viewing patterns, WBSV-TV submits 1992-93 Arbitron data for Charlotte County to demonstrate significant viewership.[15] In addition, WBSV-TV submits a petition signed by residents of Port Charlotte and Punta Gorda in Charlotte County and Arcadia in DeSoto County requesting Storer Cable to carry WBSV-TV. Finally, DeSoto Broadcasting notes that with respect to Metropolitan Statistical Areas (MSAs), which are defined by Office of Management and Budget for federal statistical use, the OMB combined the Sarasota MSA and the Bradenton MSA, relying on standards which emphasize that the two areas are linked socially and economically. Therefore, asserts WBSV-TV, the fact that Bradenton and Sarasota are now a combined MSA supports its petition.

10. WTOG, in opposition to WBSV-TV's petition, argues that there is no support for treating WWSB as similarly situated to WBSV-TV. WTOG notes that the two stations are licensed to different cities (WWSB to Sarasota and WBSV-TV to Venice), that WWSB is an ABC affiliate while WBSV-TV is an independent station, and that WWSB achieves a significantly higher share of viewers in Sarasota County than WBSV-TV. Therefore, WTOG argues, cable carriage of WWSB cannot justify WBSV-TV's request. WTOG further argues that the purpose of redefining a station's market is to correct anomalies so as to minimize disruption to viewers, and not to assist fledgling stations to gain cable carriage. WTOG asserts that Grade B coverage of the Communities is not enough, and that WBSV-TV fails to demonstrate how it meets the specific needs of the Communities. WTOG notes that WBSV-TV does not provide any viewing data for Lee, Manatee, or DeSoto Counties, and that even in Charlotte County the station's viewing is dismal. WTOG contends that a shared MSA is no basis for Commission action, because Congress chose to use viewing patterns to determine carriage rights and not MSAs.

11. WEVU in its opposition states that the Ft. Myers-Naples ADI in which it is licensed has been historically stable: for a number of years the market has consisted of the same five counties (Charlotte, Glades, Hendry and Lee). WEVU states that Arbitron assigned DeSoto County to the Tampa-St. Petersburg ADI, while the Nielsen Station Index assigned DeSoto to the Ft. Myers-Naples DMA despite the fact that Ft. Myers' stations had an aggregate 58 share in DeSoto. WEVU does not object to WBSV-TV's request to include Manatee County in its market because the communities in Manatee have natural ties to Sarasota. WEVU states that WWSB recognized that Charlotte County is not in its market when it requested Commission authorization in 1979 to relocate its transmitter northward. WEVU asserts that it is not a quirk that Charlotte and Lee Counties are not part of the Sarasota ADI. Charlotte, WEVU claims, is not a fringe county separated from the major metropolitan area of the market by mountains, but is an integral part of the Ft. Myers-Naples market. WEVU also notes that WBSV-TV is not significantly viewed in Charlotte by its own data, and that WBSV-TV presents no data for Lee or DeSoto Counties.

12. In reply, WBSV-TV states that WWSB's decades old notion of its market is not dispositive of another station's market. In fact, WBSV-TV notes, WWSB has recently filed a petition to add Charlotte communities to its market. In response to WTOG, WBSV TV states that the differences between it and WWSB do not diminish their similarity because they are located in the same county and both stations' must-carry market is artificially limited to a single county. WBSV-TV argues that the purpose of the market redefinition is to correct inaccurate reflections of the area in which a station is entitled to carriage and minimizing subscriber disruption is only a component of this requirement. WBSV-TV asserts that its must-carry zone does not reflect its true service area. WBSV-TV notes that its Grade B coverage is particularly relevant under the Commission's rules, and further notes that the most distant community WBSV-TV seeks to add, Arcadia, is only 37 miles from Venice, WBSV-TV's city of license. Finally, WBSV-TV contends that the purpose of market redefinition is to correct anomalies due to the rigid ADI borders. WBSV-TV maintains this is particularly relevant here because its current ADI barely extends beyond its Grade A contour.

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[15] For an independent station to be deemed significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 2 percent (total week hours) and net weekly circulation of at least 5 percent. 47 C.F.R. § 76.5(i). According to Arbitron's survey, *Television County Coverage: Florida* 1992-93 non-cable coverage for Charlotte County is as follows:

ADI and Station	Total Share	Net Weekly Circulation
Fort Myers-Naples		
WINK-TV (CBS, Ch. 11)	26	90
WBBH-TV (NBC, Ch. 20)	18	81
WEVU (ABC, Ch. 26)	7	63
WFTX (Fox, Ch. 36)	8	65
Tampa-St. Petersburg		
WFLA-TV (NBC, Ch. 8)	4	29
WTVT (CBS, Ch. 13)	4	26
WFTS (Fox, Ch. 28)	2	21
WTOG (Ind., Ch. 44)	2	27
Sarasota		
WWSB (ABC, Ch. 40)	4	40
WBSV-TV (Ind., Ch. 62)	2	29

ANALYSIS AND DECISION

13. We shall grant DeSoto Broadcasting's petition. WBSV-TV is in the unusual position of being assigned to a single county ADI, yet is so close to the communities in the neighboring ADIs that its City Grade service contour extends far into these other markets. The Commission's market modification process established pursuant to §614(h)(1)(C) of the Communications Act allows stations to add or delete communities from their ADI to reflect their true marketplace. To aid in the Commission's determination the Act sets out four factors indicative of localism. These factors, however are not exhaustive; the petitioner may introduce additional evidence to demonstrate that the communities are part of the station's local market.[16] Arbitron places television stations in ADIs according to the viewing patterns of those stations in each county. However, the Commission has noted that viewing data may not always provide sufficient evidence of a station's local market. In the case of a new station, viewing patterns can take up to three years to establish,[17] or in the case of specialty station the audience is typically limited.[18] Because WBSV-TV is a new station, it is appropriate to rely on other evidence of the station's local market to determine whether a particular community should be added to its market.

14. We find that WBSV-TV has demonstrated that the Communities are part of its local market. The fact that WBSV-TV places at minimum a Grade B service contour, and in many cases a Grade A or City Grade service contour, over the Communities is compelling evidence that WBSV-TV provides service to these communities. As we noted in paragraph 5, *supra*, the presence of a Grade B contour over a community is generally sufficient to satisfy this factor. Moreover, the Commission has noted the importance of a City Grade signal in determining local coverage.[19] We also note that the furthest community at issue is only 37 miles from WBSV-TV's city of license. We believe that less weight should be placed on the fourth statutory factor in this case because WBSV-TV has been on-air only since May of 1991. We believe that there has been insufficient time for WBSV-TV to garner substantial levels of viewership in all of these counties, although it clearly has begun to do so in Charlotte County. With respect to historic carriage, WBSV-TV has shown that it is historically carried on one major cable system in Charlotte County and one major cable system in Manatee County. However, WBSV-TV has also demonstrated that WWSB, the other Sarasota ADI licensee, has historically been carried by all the cable systems in question. This is precisely the situation the 1992 Cable Act was designed to remedy.[20] This is even a more compelling consideration in cases such as the one before us in which the two stations' Grade B contours overlap significantly. While WBSV-TV and WWSB are licensed to different cities in the Sarasota ADI, we do not feel that this is a serious distinction in a single-county ADI. With respect to the third factor, we believe that Congress did not intend this to be a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. Because other stations do appear to serve the cable communities at issue, this enhancement factor would not appear applicable.

15. As additional support for its request WBSV-TV notes that Bradenton in Manatee County and Sarasota are in a shared metropolitan statistical area (MSA). Since a shared MSA requires evidence of economic and social links between the two areas, we believe that, in this instance, it provides further evidence of the close economic connection between Manatee County and Sarasota County and combined with the signal coverage to these communities indicates that the natural market for WBSV-TV extends into Manatee County. We find that the close proximity and the Grade B to City Grade coverage of the communities in Charlotte and Lee County weigh heavily in favor of including these communities into the WBSV-TV's market. Moreover, the fact that cable systems in Manatee and Charlotte Counties extend into Sarasota County demonstrate that these communities are local to Sarasota. While the record to demonstrate viewing patterns or historic carriage is insufficient due to WBSV-TV's relative youth, we believe that WBSV-TV has demonstrated that WBSV-TV is local to the cable communities at issue. Therefore, we find that inclusion of the Charlotte, Lee, and Manatee County cable communities listed in notes one, two, and four, *supra*, is justified.[21]

16. With respect to DeSoto County, we find that WBSV-TV has also demonstrated that the communities therein should be included in its market. We note that the communities in question in DeSoto County are within WBSV-TV's Grade B contour, and are in close proximity to the station's home-county ADI. Moreover, just as in the other counties, WBSV-TV has presented evidence of its discriminatory carriage treatment. Though viewership evidence is lacking, as we said in paragraph 14, *supra*, we find that this is of lesser importance in the case of a new station such as WBSV-TV. Therefore, we find that grant of WBSV-TV's request to modify its market to include the DeSoto County cable communities listed in note three, *supra*, in the station's ADI is justified.

17. We note, finally, that the system carrying WBSV-TV in Charlotte, Storer Cable TV of Florida in Charlotte and Lee Counties, also serves Sarasota County. Likewise, the Storer's Longboat Key cable system, although not carrying

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[16] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[17] We have previously stated in the context of evaluating viewing data that it should be taken into account that stations can take up to three years to establish their viewing patterns. That is why §76.54 of our rules allows viewership data from the first three years of operation.

[18] Specialty stations, though limited in viewership, are capable of "offer[ing] desirable diversity of programming . . . ." *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[19] *See In Re Applications of PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240, 1243 (1991). *See also* 47 C.F.R. §73.685.

[20] *See Act III Broadcasting of Nashville, Inc.*, 8 FCC Rcd 8544, 8546 (1993).

[21] This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, channel capacity, and program duplication. *See* paragraph 7, *supra*.

WBSV-TV, serves communities in both Manatee and Sarasota Counties. The Commission has determined that a cable system whose communities straddle more than one ADI must carry the local television stations from both markets, unless the operator can technically segregate the channels on a community-by-community basis to reflect location of the community within a particular ADI.[22] Therefore, even in the absence of a market modification request, Storer's Englewood and Longboat Key systems are required to carry WBSV-TV, unless Storer can technically deliver a different channel line-up that includes WBSV-TV to those portions of Englewood and to those portions of Longboat Key in Sarasota County.

ORDER

18. In view of the foregoing, we find that grant of DeSoto Broadcasting's petition is in the public interest.

19. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed June 2, 1993 by DeSoto Broadcasting, Inc. IS GRANTED. This change shall be effective in accordance with the following schedule: DeSoto Broadcasting shall notify the cable systems in question in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of such notification.

20. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[22] *MM Docket No. 92-259*, 8 FCC Rcd at 2975-76.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Act III Broadcasting of Rochester, Inc. CSR-4035-A

For Modification of Television Broadcast Station WUHF's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1995; Released: April 27, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Act III Broadcasting of Rochester, Inc. ["WUHF"], licensee of Television Broadcast Station WUHF (Fox, Channel 31), Rochester, New York, filed the captioned petition for special relief seeking to include the communities of Middlesex, Rushville, Benton, Indian Pines, Jerusalem, Keuka Park, Milo, Penn Yan, Barrington, Branchport, and Italy in Yates County, New York (collectively known as "the Communities") within the Rochester, New York "area of dominant influence" (ADI) for purposes of the cable television mandatory broadcast signal carriage rules. A-R Cable Services - NY, Inc. ["A-R Cable"], a cable operator serving the communities in question, filed comments on the petition for special relief.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] 47 U.S.C. §534(h)(1)(C)(ii).

* * * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.,* when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue are located in Yates County, on the western edge of the Syracuse, New York ADI. WUHF is licensed to Rochester, New York and its ADI borders Yates County immediately to the north. Geographically, Yates County is bounded on the east by Seneca Lake, which cuts off direct access to Syracuse.

9. In support of its petition, WUHF states that it has been carried on the cable systems in the Communities since 1988 or 1989. WUHF states that the Penn Yan Cablevision system carries more Rochester television stations than Syracuse stations, and notes that the reference points for Rochester are closer to the Communities than reference points for Syracuse. WUHF asserts that it places a Grade B contour over the majority of the Communities and submits a map of its predicted Grade B coverage. WUHF argues that because Seneca Lake blocks access to jobs, shopping and schools in Syracuse, the topography creates a natural link between Rochester and the Communities and a natural barrier between the Communities and Syracuse. WUHF contends that forty percent of Yates residents commute to jobs outside the county, and more commuters commute to Rochester than to all Syracuse ADI counties combined; nearly three-fourths of those commuters commute to the Rochester ADI. WUHF contends that these geographic facts make the station's programming and advertising important to residents of Yates County.

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6 H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
7 *Id.* at 2977 (emphasis in original).
8 *MM Docket No. 92-259,* 8 FCC Rcd at 2977, 2977 n.139.
9 47 C.F.R. §76.59.
10 *MM Docket No. 92-259,* 8 FCC Rcd at 2981.

10. In support of its claims that WUHF has a long history of both cable and noncable viewing in the Communities, the station submits Nielsen data to demonstrate its large viewing audience in Yates County. According to Nielsen, *County/Coverage Study, County Summary:* New York 1993, viewing of Rochester and Syracuse commercial television stations in Yates County is as follows:

	Total Share	Total Average Weekly Cume
Syracuse		
WIXT (ABC, Channel 9)	19	59
WSTM-TV (NBC, Channel 3)	10	55
WSYT (Fox, Channel 68)	5	35
WTVH (CBS, Channel 5)	14	47
Rochester		
WHEC-TV (NBC, Channel 10)	5	35
WOKR (ABC, Channel 13)	5	40
WROC (CBS, Channel 8)	11	48
WUHF (Fox, Channel 31)	3	24

Finally, WUHF asserts that discontinuance of its historic carriage in the Communities would disrupt traditional viewing patterns of the residents.

11. A-R Cable in its comments states that it operates four systems serving the Communities,[11] and has historically carried WUHF as well as other Rochester stations, believing that its subscribers share a community of interest with the Rochester area. However, A-R Cable has been required to replace these stations with Syracuse stations because of Yates County's ADI designation. Given its limited channel capacity, A-R states that it cannot carry both Fox affiliates. Because of the limited channel capacity of A-R Cable's systems, the must carry rules place continued carriage of Rochester stations in jeopardy. A-R Cable does not oppose WUHF's petition,[12] provided that a grant would not require A-R to carry more than one Fox affiliate.

ANALYSIS AND DECISION

12. The inclusion of the Communities within the market area of WUHF for purposes of the cable television broadcast mandatory signal carriage rules is, considering all of the circumstances presented, consistent with the purposes specified in §614(h)(1)(C) of the 1992 Cable Act. WUHF is licensed to Rochester, New York, in the western portion of the state, to the north and west of several lengthy lakes. One of these lakes, Seneca Lake, creates a natural barrier between the Communities and Syracuse, the ADI to which the Communities are assigned, and a natural link between Rochester and the Communities. The Communities are closer to Rochester than to Syracuse, and WUHF---based on contour prediction calculations---is shown to place a Grade B contour over most of the communities in question.

13. With respect to the statutory factors, we find that WUHF has clearly satisfied the first factor---historic carriage. With respect to the second factor--- coverage and other local service to the cable community---WUHF places a predicted Grade B contour over only some of the Communities. Benton, Italy, Middlesex, and Rushville lie clearly within the contour, while Jerusalem andPenn Yan lie on its edge. However, the remaining communities in question lie just beyond WUHF's predicted Grade B contour, while Barrington lies just some 12 miles beyond. We have previously stated that Grade B coverage or close proximity is sufficient to demonstrate that a station satisfies this factor.[13] While clearly certain of the Communities lie a few miles beyond WUHF's predicted Grade B contour, they are clearly more closely proximate to Rochester than to Syracuse. We find that these facts augur for inclusion of the Communities within WUHF's ADI.

14. WUHF's submitted data show that it and other Rochester licensees garner substantial viewing in Yates County. WUHF's Nielsen data show that the station's share in noncable homes in Yates County is 2 [in cable homes the station achieves a 4 share] and its average cume is 24.[14] We believe that these viewing levels are sufficiently substantial to weigh our analysis of the fourth statutory factor in WUHF's favor. We recognize that this data is county-wide data, rather than community-specific data. We have stated, however, that absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type.[15] With respect to the third factor, we believe that Congress did not intend this to be a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. Because other stations do appear to serve the cable communities at issue, this enhancement factor would not appear applicable.

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[11] A-R Cable's Penn Yan system serves Penn Yan, Milo, Jerusalem, Benton, Indian Pines and Keuka Park with 36 activated channels. Its Branchport system serves Branchport, Italy and Jerusalem with 22 activated channels. Its Gorham system serves Rushville and Middlesex in the Syracuse ADI with 23 activated channels, though most subscribers to this system reside in Ontario County in the Rochester ADI. Its Hammondsport system serves Barrington with 31 activated channels.

[12] However, A-R Cable states that WUHF has not shown that the station adequately covers issues specifically related to the residents of the Communities, or that other qualified must carry stations fail to provide such coverage.

[13] *MM Docket No. 92-259*, 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.

[14] In fact, WUHF's county viewing according to this data would meet the viewing levels established by the Commission significantly viewed status, in both noncable and in cable homes. As a Fox affiliate, WUHF is considered an independent station for significantly viewed status purposes, and must achieve in noncable homes a share of viewing hours of at least 2% (total week hours) and a net weekly circulation of at least 5% to be deemed to be significantly viewed in a community or a county. 47 C.F.R. §76.5(i).

[15] *See, e.g., RKZ Television, Inc.*, 8 FCC Rcd 8008, 8010 (1993). *See also* paragraph 14, *infra*.

15. The portion of the Cable Act allowing for modification of ADIs "is intended to permit the modification of a station's market to reflect its individual situation."[16] In the instant case, taking into account the totality of the circumstances involved, including in particular the topography of the area and the evidence submitted by WUHF demonstrating that Yates County is economically linked with the Rochester market, we conclude that given WUHF's "individual situation," inclusion of the communities in question is consistent with the value of localism and will better effectuate the purposes of the carriage rules. We note, too, that A-R Cable, the cable operator serving the Communities, has itself stated that its subscribers share a community of interest with the Rochester area, and that A-R Cable has long determined, even during the absence of mandatory signal carriage requirements, that the option to carry WUHF (as well as other Rochester licensees) is warranted. In view of the totality of the circumstances presented by both WUHF and by A-R Cable, we find that grant of WUHF's petition is justified. With respect to A-R Cable's concern that it not be required to carry more than one Fox affiliate, we reiterate that no cable operator is required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried. In addition, cable operators are generally required to devote no more than one-third of their systems' activated channel capacity to compliance with the mandatory signal carriage obligations. *See* paragraph 7, *supra*.

ORDER

16. In view of the foregoing, we find that grant of WUHF's petition is in the public interest.

17. Accordingly, IT IS ORDERED, pursuant to § 614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed August 2, 1993 by Act III Broadcasting of Rochester, Inc. IS GRANTED. This change shall be effective in accordance with the following schedule: Act III Broadcasting of Rochester, Inc. shall notify the cable systems in question in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of such notification.

18. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[16] *MM Docket 92-259*, 8 FCC Rcd at 2977.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Holiday Broadcasting Company,
Debtor-in-Possession[1]

For Renewal of Licenses for Stations KRSP/KRSP-FM[2] Salt Lake City, Utah — File Nos. BR - 900611UE, BRH - 900531B3

For Assignment of License for Station KRSP-FM Salt Lake City, Utah — File No. BALH - 931130GI

Simmons Family, Inc.

For Renewal of Licenses for Stations KDYL/KSFI-FM Salt Lake City, Utah — File Nos. BR - 900601D8, BRED - 900601ZI

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 7, 1995; Released: April 27, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications filed for four radio stations in Salt Lake City, Utah; (ii) an assignment application to assign the license of station KRSP-FM, from Holiday Broadcasting Company, Debtor-in-Possession to KRSP, Incorporated; (iii) a Petition to Deny timely filed on September 4, 1990, by the Arizona State Conference of Branches of the NAACP and the Idaho/Nevada/Utah State Conference of Branches of the NAACP and by various local NAACP branches (NAACP) against the renewal applications of these stations;[3] (iv) oppositions from the licensees; (v) the licensees' responses to staff letters of inquiry; (vi) a Petition to Deny timely filed on January 7, 1994, by the Idaho/Nevada/Utah State Conference of Branches of the NAACP (NAACP) against the assignment application for KRSP-FM;[4] and (vii) other pleadings.

II. BACKGROUND

2. The NAACP alleges that the above-captioned stations violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, the NAACP requests that we conduct an investigation of the stations' employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*). The NAACP also requests that the Commission designate the renewal applications and the assignment application for hearing with a view towards denying them. The licensees charge that the NAACP has presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted as well as grant of the assignment application.

III. PLEADINGS

3. *STANDING.* In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline); Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

4. Submitted with the petitions to deny the renewal and assignment applications were declarations under penalty of perjury from the President of the Salt Lake City Branch of the NAACP. The statements indicate that declarant is a listener of Stations KRSP/KRSP-FM and KDYL/KSFI-FM, all licensed to Salt Lake City. The licensee of KDYL/KSFI-FM, Simmons Family, Inc. (Simmons), argues that the NAACP lacks standing to file the petition against assignment because the NAACP allegedly fails to state a *prima facie* case against the assignment. Simmons argues that the NAACP's arguments do not constitute a *prima facie* case because they consist almost entirely of arguments from the petition against renewal and raise only one new, albeit erroneous, point. The NAACP rejects the licensee's argument that a petition to deny an assignment application constitutes a *prima facie* case only if it raises new matters. The NAACP contends that the Commission must consider

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[1] Station KRSP-FM filed for bankruptcy on May 7, 1993.

[2] The call letters for the AM station were changed to KKDS(AM) on September 24, 1990. In this *Order* we will refer to the station by its former call letters.

[3] The petition also included stations in Nevada and Arizona. Some have been addressed in separate Commission orders. *See Applications of Sun Mountain Broadcasting Inc.*, 9 FCC Rcd 2124 (1994) *petitions for recon. pending; Applications of Edens Broadcasting, Inc.*, 8 FCC Rcd 4905 (1993); *License Renewal Application of Duffy II Corporation*, 6 FCC Rcd 1876 (1991); *Applications of Commonwealth Broadcasting of Northern California*, 9 FCC Rcd 2108 (1994) *petitions for recon. pending.* Two other renewal applications were resolved by action of the Mass Media Bureau Chief on May 18, 1992 (Stations KROW/KNEV-FM). The remaining applications will be reviewed in a separate Commission order.

[4] On November 30, 1993, Holiday Broadcasting Company, the licensee of KRSP-FM (and the Debtor in Possession) filed an application to assign the license of that station to KRSP, Inc. Simmons Family, Inc., the licensee of KDYL/KSFI-FM, is the parent company of KRSP, Inc.

the arguments from its pending petition against renewal when deciding whether to approve the assignment of KRSP-FM. The NAACP did not initially reply to the licensees' oppositions to the petition to deny the renewal applications, or the licensees' inquiry responses. However, in the petition to deny the assignment application, the NAACP included some arguments concerning the licensees' responses and we will consider those arguments.

5. We find Simmons' objections to be without merit. 47 U.S.C. § 309(d)(1). The question of standing is independent of the merits of the petition to deny or whether a *prima facie* showing has been made. We hold that the NAACP has petitioner status against Stations KRSP/KRSP-FM and KDYL/KSFI-FM concerning both the renewals and assignment. *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *see also Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) [citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)].

6. *PRIMA FACIE CASE.* The NAACP derived its factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us to conclude that the NAACP presented a *prima facie* case against Stations KRSP/KRSP-FM and KDYL/KSFI-FM demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. § 309(d)(1). *Astroline*. Further inquiry was therefore necessary. *See Bilingual*. For the same reasons, we find that the NAACP presented a *prima facie* case against the assignment of KRSP-FM.

7. Subsequent review of the NAACP's EEO allegations, as well as each licensee's renewal applications, opposition and inquiry response, leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence of employment discrimination. Thus, grant of the renewal applications will serve the public interest. 47 U.S.C. § 309(d)(2); *Astroline*. However, we will grant renewal with appropriate remedies and sanctions.

IV. DISCUSSION

8. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* §§ 73.2080(b) and 73.2080(c).[5]

9. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987); *see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters).

KRSP/KRSP-FM, Salt Lake City, Utah

10. Review of the licensee's consolidated opposition/inquiry response, as well as the renewal applications, indicates that the licensee filled nine full-time positions, including seven upper-level job vacancies, from June 1, 1987, to May 30, 1990.[6] In its renewal applications, the licensee indicated recruitment contact with the *Salt Lake Tribune, Deseret News* and *Radio & Records* from June 1, 1989, to May 30, 1990. Review of the licensee's renewal applications and inquiry response indicates that contact with these sources was initiated in 1989. The licensee indicates that one of the newspapers referred an Hispanic female and that *Radio & Records* referred an Hispanic male. The licensee states that it contacted, but received no minority referrals from, the following sources for its nine openings: Utah Department of Employment Security, Anti-Discrimination Division of the Utah Industrial Commission, Phoenix Institute, NAACP, Mexican American Civic League, Utah Job Service, Salt Lake Community College, Utah Valley Community College, Brigham Young University, University of Utah, Weber State College, Westminster College, Private Industry Council and Bryman School of Broadcasting. The licensee also solicited minority and female referrals from its employees. The licensee reports that it conducts internships in its news, sales and research departments and encourages schools and universities to refer minorities to these programs. Overall, the licensee reported 66 applicants for nine jobs, including two Hispanic applicants for two jobs (one upper-level, one lower-level).[7]

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[5] The licensees are reminded that under our EEO Rule, 47 C.F.R. §73.2080, they have an affirmative obligation to recruit for females and minorities for each vacancy. To the extent that licensees fail to do so, female, as well as minority, employment is affected.

[6] The current license term ended October 1, 1990.

[7] KRSP/KRSP-FM is located in the Salt Lake City-Ogden MSA which includes 40.8% females, .8% Blacks, 4.5% Hispanic, 1.7% Asian/Pacific Islander, .5% American Indian. The licensee's 1984 Annual Employment Report indicated an overall and upper-level staff of 27 employees. One Hispanic (4%) was employed on both staffs. In 1985, both the overall and upper-level staffs increased to 29 employees. One Black (3%) was employed on both staffs. In 1986, the overall staff decreased to 28 employees and the upper-level staff decreased to 27 employees. No minority employees were reported in 1986. The full-time staff in 1987 comprised 28 persons, including one (4%) Black employee and the upper-level staff of 26 employees likewise included one (4%) Black. In 1988 the licensee reported a full-time staff of 29 persons which included one (3%) Black employee; the upper-level staff of 26 employees included one (4%) Black. The licensee's staff in 1989 comprised 29 overall full-time employees, including one (3%) Hispanic employee. The upper-level staff consisted of 26 employees, including one (4%) Hispanic employee. The licensee's 1990 Annual Employment Report noted 24 overall, including 23 upper-level, employees. One (4%) Hispanic was among the 24 overall employees.

While the total number of interviewees is unknown, the licensee indicates that it interviewed and hired one Hispanic for a lower-level position.

11. The NAACP charges that the licensee's EEO efforts have not been meaningful for two consecutive license terms. The NAACP states that the licensee has identified virtually the same unproductive minority referral sources in its 1990 renewal applications as in its 1983 renewal applications. According to the NAACP, none of the 15 full and part-time renewal year hires was a minority and recruitment efforts during the same period attracted only one minority applicant. Lastly, the NAACP contends that it is most concerned with the "utter absence of any EEO efforts, either documented or proposed" in the licensee's renewal applications.

12. In response, the licensee states that the instant petition filed by the NAACP represents the first challenge to renewal in its 20-year history as licensee of KRSP/KRSP-FM. It adds that it has made meaningful and ongoing efforts to contact minority organizations for its openings, and that it continues to refine its efforts.[8] The licensee does not respond to the NAACP's other arguments, but states that it has employed at least one minority in a full-time capacity from 1984 to 1990, with the exception of 1986. It adds that of nine full-time hires over the three-year period, one (11%) minority hire represents "sincere dedication and effort" in a 7.5% minority labor force. Lastly, the licensee states that, while it has encouraged minority referrals for its news, sales and research internships, it has not received any minority referrals.

13. Based on the foregoing, we find no substantial and material questions of fact to warrant designation for hearing.[9] *See Astroline*. We find no evidence of employment discrimination. Moreover, we believe that the licensee's overall efforts were such that no sanction or remedy is warranted. Thus, grant of the stations' renewal is in the public interest. The licensee recruited using minority sources for all of its openings, added sources in 1989, received minority referrals and applicants, and hired a minority. We also note that the licensee had only nine hiring opportunities over a three-year period and is located in an area with only a 7.5% minority labor force. In addition, we found that the licensee identified and contacted 16 recruitment sources. For nine full-time hires it attracted two minority applicants and hired one. We are concerned, however, that the licensee did not assess and improve its performance with regard to Hispanics. The licensee did not adequately attract Hispanic referrals, nor were Hispanics in all of its applicant pools. While the licensee has identified area high schools as a potential source of qualified minority applicants, we do not find that the licensee significantly altered its sources based on a review of its recruitment efforts in order to diversify its hiring pools. Therefore, we admonish the licensee to more vigorously implement and assess its affirmative action program to address the absence of Hispanics in some of its applicant pools.

KDYL/KSFI-FM, Salt Lake City

14. Review of the licensee's renewal applications, opposition and inquiry response reveals that during the period June 1, 1987, to May 31, 1990, the licensee had 16 full-time hiring opportunities, including 12 for upper-level positions. In its renewal applications, the licensee reports minority referrals from the *Salt Lake Tribune* (1), the University of Utah (1) and from employees (1).[10] The licensee also reports contacts for 14 openings with, but no minority referrals from, a newspaper, a community group, a womens' organization, three minority organizations, five schools, and five employment services.[11] In addition to the foregoing sources, the licensee indicated that it mailed notices about 14 of its vacancies to 23 community and social service organizations, including 16 minority sources, 15 of which are in or near Salt Lake City.[12] Also, the licensee states that it mailed job notices to the stations' sources on a quarterly basis. The licensee reports 91 applicants/interviewees overall for its 16 full-time vacancies, including one minority interviewee for an upper-level job. KDYL/KSFI-FM hired no minorities for its 16 full-time jobs for the period under review.[13]

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[8] Part of its new efforts, according to the licensee, has been contact with area minority high schools, which it initiated prior to the filing of the instant petition. The licensee indicates that station personnel attend job career days at the schools. Also, the licensee states that it intends to track students interested in broadcasting as they advance through college or other training programs.

[9] In its renewal applications, the licensee indicated that, in December 1989, a discrimination case was filed against the stations in U.S. District Court by a Black male formerly employed as a full-time announcer. Pursuant to a later inquiry, the licensee explained that the case was settled and dismissed in April 1991. Absent a court finding of licensee discrimination, we find no evidence of discriminatory conduct where a complaint has been filed against a station.

[10] Although the licensee's applications indicate that it received three minority referrals, its inquiry response notes only one minority applicant for a full-time position and one minority applicant for a part-time position during this period.

[11] In this regard, we note that the licensee's inquiry response reveals that one sales position was listed in the stations' internal job postings and one clerical position was advertised in the newspaper and internally posted. However, neither job underwent what the licensee describes as its usual recruitment process, including notices to general as well as minority and female sources. According to the licensee, while it attempts to send job notices routinely to all of its organizations, "occasional errors have resulted in incomplete mailings."

[12] The licensee reports that it revised its list of recruitment contacts in January 1989 to incorporate new sources. Its new list includes 99 organizations, 96 of which are in Utah. The list includes five minority organizations in Utah and one in Los Angeles, California. Seven of the 16 hires in the three-year review period came after January 1989.

[13] In its renewal applications, the licensee includes labor force statistics which it indicates represent county percentages for the minority and female labor force. However, the licensee neither indicates to which specific county the statistics pertain, nor articulates the factors necessary for use of alternative labor force data. *See Buckley Broadcasting Corp.*, 9 FCC Rcd 2099, 2101 (1994). Hence, we do not find that the licensee made a reasoned argument for use of alternative labor force data. *See* n.7, *supra*, for Salt Lake City MSA labor force statistics. The licensee's 1984 Annual Employment Report revealed an overall staff of 35 employees, including one Hispanic and one American Indian (6%). The upper-level staff of 31 included one American Indian (3%). In 1985, 41 overall employees were reported, including one Hispanic and one American Indian (6%). The upper-level staff of 35 included one Hispanic (3%). The overall staff decreased in 1986 to 25 employees and no minorities were reported. No minorities were reported on the upper-level staff of

15. The licensee explains that several factors have affected its ability to attract minorities to the stations. First, it states that its nostalgia and light rock formats "have a reduced appeal to the younger demographic segments from which entrance-level minorities would most likely come." Second, it asserts that more experienced minority applicants are in demand in the Salt Lake City market.

16. The NAACP argues that the licensee's current EEO program is insufficient to justify grant of its renewal applications. In support, the NAACP states that KDYL/KSFI-FM's renewal applications reflect only one minority part-time hire of 13 hires during the year prior to submission of the renewal applications. Moreover, the NAACP claims that only three minority referralsh were reported, with none emanating from the licensee's minority sources.

17. In response, the licensee counters that the one minority hired during the renewal year is "hardly ... an indication of inadequacy."[14] The licensee asserts that the Salt Lake City NAACP is among its recruitment sources but that it has never received any referrals from the NAACP. Finally, regarding assessment, the licensee explains that it has tracked applicant and interviewee data for each job since January 1989, and it assesses its program efforts by staff evaluations of its recruitment sources.[15]

18. There are no substantial and material questions of fact warranting designation for hearing. *Astroline*. The licensee employed minorities during the license term and there is no evidence of employment discrimination. In addition, the licensee contacted referral sources, including minority-oriented sources, for some of its vacancies. Therefore, renewal of the licenses is in the public interest.

19. However, we find KDYL/KSFI-FM's overall recruitment efforts deficient because it engaged in inconsistent recruitment. Also, the licensee's efforts resulted in only one minority applicant for the 16 positions filled during the review period. 47 C.F.R. § 73.2080.

20. Recently, we adopted a Policy Statement regarding forfeitures to be assessed for violations of our EEO rules. *Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*, 9 FCC Rcd 929 (1994) ("EEO Policy Statement") (petitions for reconsideration and requests for clarification pending). A court decision issued since the EEO Policy Statement indicated that our general policy statement[16] on forfeitures must be put out for notice and comment. *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (*"USTA"*). While the *USTA* case did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the EEO Policy Statement until it is likewise made available to the public for notice and comment. *See, e.g., Petition for Declaratory Ruling by Eagle Radio, Inc.* (filed August 11, 1994); *Letter from Henry L. Baumann to William E. Kennard*, July 13, 1994. We will respond to these concerns in a separate order. In the meantime, we will utilize our pre-January 1994 process of *stare decisis* by relying upon case precedent to resolve the decisional case. In this regard, we will evaluate the matter before us by examining factors such as station size, number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment and record-keeping.

21. We believe that the record in the instant case is similar to that of the licensee of KARO(FM), Columbia, Missouri, in *Applications of Communications Fund, Inc. et al.*, 7 FCC Rcd 8636 (1992).[17] KARO(FM) recruited for only eight of its 16 vacancies during the review period. The licensee received 178 applicants, attracting only seven minorities for the 16 positions. In addition, the station failed to self-assess its EEO program until the reporting year. Regarding record-keeping, the licensee was unaware until after the license term expired that it lacked documentation indicating contacts with some of the recruitment sources reflected in its renewal application. The licensee hired one minority for a full-time position during the review period. In that case, we concluded that KARO(FM) did not meaningfully self-assess its EEO program and failed to make sufficient efforts to attract minorities throughout the review period. The licensee received a $4,000 Notice of Apparent Liability and reporting conditions.

22. KARO(FM), although issued in 1992, was decided based on a former forfeiture authority, which was significantly lower in amount.[18] Previously, the forfeiture penalty assessed against a broadcaster could "not exceed $2,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation could not exceed a total of $20,000". In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 101-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act".

23. Our review of the record in the instant case reveals that the licensee contacted recruitment sources for 14 positions filled during the review period. Notwithstanding the

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22 employees in 1986. In its 1987 Annual Employment Report KDYL/KSFI-FM reported an overall staff of 23 employees, including one (4%) American Indian and an upper-level staff of 20 employees, including one (5%) American Indian. From 1988 through 1990, the licensee reported no minority employees on its overall staff of 21 to 24 employees, nor its upper-level staff which ranged from 17 to 20 employees.

[14] The licensee hired an Hispanic male for a part-time technician position.

[15] The licensee adds that its two primary sources of qualified minority candidates have been colleges and universities, as well as the Church of Jesus Christ of Latter Day Saints. However, the licensee's records did not identify minority applicants from either of these sources for specific full-time positions open during the three-year period of review. Apart from these sources, according to the licensee, very few minority referral sources have proven successful.

[16] *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993).

[17] The Columbia, Missouri MSA had an available labor force of 8.2% minority (5.8% Black, 1.0% Hispanic, 1.1% Asian/Pacific Islander, 0.3% American Indian). The station's 1989 Annual Employment Report listed one Hispanic (5.6%) among 18 full-time employees overall and no minorities among 17 upper-level job employees.

[18] Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b)(2), authorizes the Commission to impose monetary forfeitures on broadcast station licensees or permittees for violations of the Act or of regulations promulgated thereunder.

licensee's reassessment of its efforts in 1989, KDYL/KSFI-FM failed to self-assess adequately as it engaged in inconsistent recruitment efforts. *See* n.11, *supra.* Further, the licensee received 91 applicants including only one minority for the 16 positions filled during the review period. Moreover, minorities were absent from the stations' staff in 1986 and from 1988 to 1990. *See* n.13, *supra.* Although the Salt Lake City MSA labor force includes a relatively small percentage of minorities (7.5%), the licensee hired no minorities during the review period.

24. We believe that the instant facts are, in several respects, more serious than those in KARO(FM). The licensee here received only one minority applicant while the licensee of station KARO(FM) received seven minority applicants. Both KARO(FM) and KDYL/KSFI-FM engaged in inconsistent recruitment efforts. As the Commission stated in *Leflore Broadcasting, Inc. v. FCC,* 66 FCC 2d 734, 784-85 (1985), a station's format has no bearing on its EEO obligations. Further, KDYL/KSFI-FM did not hire any minorities during the review period. Station KARO(FM) hired one minority during its review period. Given the facts of this case, broadcasters' familiarity with our long standing EEO Rules, as well as our expanded forfeiture authority in this area, we feel that the circumstances in this case justify issuance of a Notice of Apparent Liability for $8,000. Accordingly, we will grant renewal subject to reporting conditions as set forth below and issue a Notice of Apparent Liability for $8,000. *Assignment Application*

25. In its challenge to the assignment application for KRSP-FM, the NAACP asserts that the EEO records of both the assignor and assignee warrant a hearing. The NAACP incorporates by reference all of its arguments against the renewals for Holiday Broadcasting Company (Holiday), the assignor and Simmons, the assignee. In addition, the NAACP contends that Simmons' rationale for its failure to attract minorities (*see* ¶ 15, *supra)* reflects racial stereotyping and discriminatory intent. The NAACP also criticizes Simmons for failing to employ minorities in 1991 and 1992. The NAACP argues that once renewal hearings are held and, subsequently, the renewals are denied, Holiday will have nothing to sell and Simmons would be unfit to obtain KRSP-FM, thus, the assignment should be denied.

26. Holiday and Simmons both argue that the NAACP is using the petition to deny the assignment to re-argue its petition to deny the renewals, which they assert has been fully addressed. Holiday argues that, even if the Commission finds that it and/or Simmons have violated the EEO Rule, this finding would not preclude the granting of the assignment application and that any reporting conditions would apply to the assignee.[19] Simmons argues that the NAACP is using the petition against the assignment to reply late to Simmons' inquiry response in the renewal proceeding. It contends that the NAACP's arguments should not be considered because the NAACP had a chance to comment on the response after it was filed but chose not to until it filed the petition to deny the assignment application.

27. In reply to the NAACP's charges, Simmons acknowledges that its stations, KDYL/KSFI-FM, employed no minorities full-time in 1991 or 1992, but states that it hired a minority part-time in 1992 and promoted him to full-time announcer as reflected in its 1993 report.[20] Replying to the accusation that Simmonsstereotyped young minorities by saying they are unlikely to work at KDYL/KSFI-FM because they dislike "oldies" or light rock music, Simmons argues that it did not single out minorities and based its conclusions on music preference demographic studies of all young people. In response to the accusation that it discriminates against minorities with broadcast experience, Simmons denies that it discriminates when it states that minorities with experience are in such demand that other stations in the Salt Lake City market which pay more are better able to attract minority applicants.

28. In reply, the NAACP argues that the Commission must consider arguments it made in the petition to deny the renewal applications in the context of the assignment because they are relevant to the records of both assignor and assignee. The NAACP agreed that an EEO Rule violation does not necessarily bar an assignment but argued that it does if a hearing is involved.

29. After reviewing the record and the arguments of both parties, we find the petition to deny the assignment application to be without merit. In reviewing the renewal applications of both the assignor and assignee, we already addressed the licensees' EEO records and the NAACP's allegations and found that the renewals may be granted without hearing. *See supra* paragraphs 8-24. Therefore, we find that the EEO allegations raised in the petition to deny the renewal application do not bar grant of the assignment application. Accordingly, the petition to deny the assignment will be denied and the assignment will be granted.

V. CONCLUSION

30. Upon review of the record, we find that grant of the renewal applications is justified in all cases and that the assignment application of KRSP-FM should not be denied on EEO grounds. Therefore, we will renew the licenses for Stations KRSP/KRSP-FM with an admonishment and KDYL/KSFI-FM subject to reporting conditions and a Notice of Apparent Liability for $8,000. Finally, we will grant the assignment application of KRSP-FM.

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[19] The licensee cites, in support of its argument, *Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio,* 3 FCC Rcd 6944, 6947 n.26 (1988) (*Michigan),* and *Letter to Mr. Harry Shriver, The Baltimore Radio Show, Inc. (WFBR, Baltimore, Maryland),* 3 FCC Rcd 5913, 5913 n.2 (1988).

[20] Annual Employment Reports for KDYL/KSFI-FM indicate that, in 1991, the stations employed 22 employees (18 upper-level) with no minorities and in 1992, they employed 19 employees overall (16 upper-level) with no minorities. In 1993, the stations employed 22 employees overall (19 upper-level) with one minority, a Black announcer (4.6% of overall and 5.3% of upper-level staff). Because the reports cover periods after the license term expired, they are considered post-term EEO performance. *See* 47 C.F.R. Section 73.1020(a). Annual Employment Reports for KRSP/KRSP-FM indicate that, in 1991, the stations employed 19 employees overall (all upper-level), with no minorities. In 1992, they employed 19 employees overall (17 upper-level) with five minorities (26.3%) -- three Blacks, one Hispanic and one Asian. Four minorities were in upper-level positions (23.5%), three Blacks and one Hispanic. In 1993, they employed fewer than five full-time employees and provided no further data on employees.

VI. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED that the Petition to Deny filed by the Arizona State Conference of Branches of the NAACP and the Idaho/Nevada/Utah State Conference of Branches of the NAACP and their affiliate branches against the renewal applications for KRSP/KRSP-FM and KDYL/KSFI-FM IS DENIED.

32. IT IS FURTHER ORDERED that the Petition to Deny filed by the Idaho/Nevada/Utah State Conference of Branches of the NAACP against the assignment application for KRSP-FM IS DENIED.

33. IT IS FURTHER ORDERED that the license renewal applications for KDYL/KSFI-FM ARE GRANTED subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $8,000.

34. IT IS FURTHER ORDERED that the application to assign the license of KRSP-FM from Holiday Broadcasting Company to KRSP, Inc. IS GRANTED.

35. IT IS FURTHER ORDERED that the licensee of Stations KDYL/KSFI-FM submit to the Commission an original and one copy of the following information on June 1, 1995, June 1, 1996, and June 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[21]

(b) A list of all employees as of the May 1, 1995, payroll period for the first report and as of the May 1, 1996, and May 1, 1997, payroll periods for the second and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

36. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this *Memorandum Opinion and Order and Notice of Apparent Liability* to all parties.

37. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

38. Should the parties have any questions regarding this action or require further information concerning employment reports, they may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee of KDYL/KSFI-FM may take any of the actions set forth in Section 1.80 of the Communications Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Order. Any comments concerning their ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[21] Such a list might start:

1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (08/19/94)

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-58

In the Matter of

Amendment of Part 13 of the
Commission's Rules to Provide
Temporary Conditional Operating
Authority for Commercial Radio
Operator License Applicants.

REPORT AND ORDER

Adopted: April 17, 1995; Released: April 27, 1995

By the Commission:

I. INTRODUCTION

1. On June 13, 1994, we adopted a *Notice of Proposed Rule Making* (*Notice*)[1] in the above-captioned proceeding. In the *Notice*, we proposed to authorize persons who have passed the required examinations and applied for commercial radio operator licenses to perform the functions of a commercial radio operator on a temporary and conditional basis while awaiting their licenses.[2] This *Report and Order* adopts the rules as proposed.

II. DISCUSSION

2. The Commission's rules require a station operator in a number of radio services to hold a commercial radio operator license, certificate or permit (license). After passing the examinations necessary to qualify for certain of these licenses,[3] and submitting an application to the Commission, an applicant currently must wait for the Commission to process the application. Many of these applicants, however, must have the license as a condition of employment and, therefore, are delayed in starting to work.

3. The National Association of Business and Educational Radio, Inc. (NABER) filed comments in this proceeding. NABER states that it unequivocally supports our proposal.[4] It agrees that many commercial radio operator license applicants need their license as a condition of employment, and that our proposal would permit many people to commence work immediately after they receive their Proof-of-Passing Certificates (PPCs).[5] We will, therefore, adopt the rule amendments as proposed.

4. These rule amendments provide that possession of the PPC document will activate the operating authority of a commercial radio operator temporarily and conditionally until the license is granted. For purposes of making log entries,[6] the amended rules require a commercial radio operator exercising temporary conditional operating authority to enter the PPC serial number and date of issue in place of the FCC-issued license serial number and expiration date. We also are including minor rule amendments that clarify certain Commission procedures. These rule amendments we are adopting are yet another step in creating a government agency that works better and costs less.

5. We believe these rule amendments will provide improved service to our customers by permitting applicants who have passed the qualifying examinations and applied for a commercial radio operator license[7] to perform the functions of a commercial radio operator prior to receiving the Commission license. This will be a significant benefit to persons who must have the license as a condition of employment. These individuals will be able to start work immediately. NABER's comments, furthermore, represent industry's support, and specifically recognize this procedure is verifiable and simple to implement.

6. In summary, we are adopting rule amendments to authorize persons who have passed the required examinations and applied for commercial radio operator licenses to perform the functions of a commercial radio operator on a temporary and conditional basis while awaiting their licenses. Our decision will increase the availability of licensed commercial radio operators by eliminating the license processing delay inherent in the current licensing system.

III. PROCEDURAL MATTERS

7. **Final Regulatory Flexibility Analysis.**

Need and purpose of this action. This rule making proceeding was needed to obtain comments regarding our proposal to authorize persons who have passed the required examinations and applied for commercial radio operator licenses to perform the functions of a commercial radio operator on a temporary and conditional basis while awaiting their licenses. The purpose of this action is to permit persons who must have the license as a condition of employment to start work immediately. A likely secondary

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[1] 9 FCC Rcd 3134 (1994).

[2] *See Notice* at para. 1.

[3] The types of commercial operator licenses are: Restricted Radiotelephone Operator Permit (examination not required), Marine Radio Operator Permit, General Radiotelephone Operator License, Global Maritime Distress and Safety System (GMDSS) Radio Operator's License, GMDSS Radio Maintainer's License, and First, Second, and Third Class Radiotelegraph Operator's Certificates. The Ship Radar Endorsement also requires examination. *See* Section 13.7 of the Commission's Rules, 47 C.F.R. § 13.7.

[4] NABER comments at 3.

[5] NABER also suggests we reduce the time an individual has to apply for a commercial operator license from 365 days to 60 days. We will not adopt this suggestion. Many licenses require an applicant to pass multiple examination elements, some of which are complex. Shortening the period to apply for a license would limit an applicant's flexibility to prepare and qualify for a license.

[6] *See* Section 13.19 of the Commission's Rules, 47 C.F.R. § 13.19.

[7] Part 13 requires that the applicant submit the application to the Commission after obtaining a proof-of-passing certificate from a commercial operator license examination manager for any required examination elements. *See* Section 13.9(c).

benefit is applicants will receive their Commission-issued licenses sooner due to a reduction in the number of inquiries to the processing staff regarding the status of pending applications.

Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis. The commentor agrees that the potential impact of these rule changes is to improve the efficiency in licensing commercial radio operators, thereby making it easier for persons to become licensed commercial radio operators. No other comments were received.

Significant alternatives considered and rejected. Alternatives include the Commission continuing to require persons wait until they receive a Commission-issued license document before they can perform the functions of a commercial radio operator. The proposed alternative is adopted to minimize the impact on persons who require this document as a condition of employment.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that effective **July 1, 1995**, Part 13 of the Commission's Rules, 47 C.F.R. Part 13, IS AMENDED as set forth below. Authority for this action is found in Sections 4(f)(4)(A), (B), and (J), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(f)(4)(A), (B),and (J), 154(i), and 303(r).

9. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

10. For further information, contact the Private Wireless Division, (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 13 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 13 - Commercial radio operators

1. The authority citation for Part 13 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.

2. Section 13.9 is revised by redesignating paragraphs (d) and (e) as paragraphs (e) and (f) respectively, and adding a new paragraph (d) to read as follows:

§ 13.9 Eligibility and application for new license or endorsement.

* * * * *

(d) Provided that a person's commercial radio operator license was not revoked, or suspended, and is not the subject of an ongoing suspension proceeding, a person whose application for a commercial radio operator license has been received by the FCC but which has not yet been acted upon and who holds a PPC(s) indicating that he or she passed the necessary examination(s) within the previous 365 days, is authorized to exercise the rights and privileges of the operator license for which the application was received. This authority is valid for a period of 90 days from the date the application was received. The FCC, in its discretion, may cancel this temporary conditional operating authority without a hearing.

* * * * *

3. Section 13.13 is revised by redesignating paragraphs (d) and (e) as paragraphs (e) and (f) respectively, and adding a new paragraph (d) to read as follows:

§ 13.13 Application for a renewed or modified license.

* * * * *

(d) Provided that a person's commercial radio operator license was not revoked, or suspended, and is not the subject of an ongoing suspension proceeding, a person holding a General Radiotelephone Operator License, Marine Radio Operator Permit, First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, GMDSS Radio Operator's License, or GMDSS Radio Maintainer's License, who has an application for another commercial radio operator license which has not yet been acted upon pending at the FCC and who holds a PPC(s) indicating that he or she passed the necessary examination(s) within the previous 365 days, is authorized to exercise the rights and privileges of the license for which the application is filed. This authority is valid for a period of 90 days from the date the application is received. The FCC, in its discretion, may cancel this temporary conditional operating authority without a hearing.

* * * * *

4. Sections 13.19(b)(3) and (c) are revised to read as follows:

§ 13.19 Operator's responsibility.

* * * * *

(b) ***

(3) The class, serial number and expiration date of the license when the FCC has issued the operator a license, or the PPC serial number(s) and date(s) of issue when the operator is awaiting FCC action on an application:

(c) When the operator is on duty and in charge of transmitting systems, or performing service, maintenance or inspection functions, the license or permit document, or a photocopy thereof, or a copy of the application and PPC(s) received by the FCC, must be posted or in the operator's personal possession, and available for inspection upon request by a FCC representative.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-59

In the Matter of

Amendment of Part 97 of the	RM-8218
Commission's Rules Concerning	RM-8280
HF Digital Communications in the	
Amateur Service.	

REPORT AND ORDER

Adopted: April 17, 1995; Released: April 27, 1995

By the Commission:

I. INTRODUCTION

1. On June 13, 1994, we adopted a *Notice of Proposed Rule Making* (*Notice*)[1] in the above-captioned proceeding. In the *Notice*, we proposed to authorize automatic control[2] of stations transmitting digital emission types on the High Frequency (HF) amateur service bands,[3] subject to two conditions for such operation. The automatically controlled station must either be connected to another station that is under manual control, or the automatically controlled station must transmit within a subband designated for this purpose.[4] In this *Report and Order*, we adopt the proposed rules.

II. DISCUSSION

2. In response to the *Notice*, we received nineteen comments and one reply comment. The comments ranged from recommending that automatic control not be authorized under any condition to recommending that automatic control be authorized unconditionally. They confirmed generally that the amateur service has a need for stations to transmit digital emission types on the HF bands while under automatic control. The comments also established that there is concern that such transmissions could cause interference to other communications.[5] The comments, however, generally agree that the conditions proposed will provide the necessary degree of protection against such interference. They indicated, moreover, that the desired communications can be carried out under the conditions proposed.

3. Except for temporary authority we issued to permit a feasibility study directed by The American Radio Relay League, Inc. (ARRL),[6] automatic control has not been authorized on the HF bands. Heretofore we have considered immediate action by the station control operator as necessary to avoid causing interference to the communications of other amateur stations transmitting on an HF band.[7] A station transmitting on an HF band usually demands greater attention by its control operator than does a station transmitting on Very-High Frequency (VHF) and higher frequency bands because HF radio wave propagation is long range and changes often.[8] The comments, however, indicated that such operation is practical on the HF bands when the automatically controlled station is simply responding to interrogation by a station having the control operator at its control point or when the station is transmitting on a channel located within a small subband designated for that purpose.

4. The ARRL supports the proposal.[9] It states that absent consensus in the comments, we should take the compromise approach reflected in the rules as proposed.[10] It contends that authorization of automatic control will result in greater flexibility in experimentation and development of digital communications as well as facilitate adaption of existing digital technologies to practical use.[11] In another comment that strongly supported automatic control, however, Colby states that establishing and maintaining communications on a shared HF channel is no different than it is on a shared VHF channel, and opposes any conditions on automatically controlled amateur stations beyond those now required in the VHF bands.[12] The ARRL argues that additional conditions proposed are necessary because any automatically controlled station transmitting in a crowded

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[1] 9 FCC Rcd 2850 (1994).

[2] Section 97.3(a) of the Commission's Rules, 47 C.F.R. § 97.3(a), defines automatic control as the use of devices and procedures for control of a station when it is transmitting so that compliance with the Commission's Rules is achieved without the control operator being present at a control point. Only stations specifically designated in the rules may be automatically controlled.

[3] In the HF range (3-30 MHz), the amateur service is allocated 3.55 MHz of spectrum in nine bands between 3.5-29.7 MHz. Digital emission types may be transmitted on 1.182 MHz of this spectrum and analog voice and image emission types on the remainder. There are nine digital data emission types for telemetry, telecommand, and computer communications and nine digital RTTY emission types for narrow-band direct-printing telegraphy communications. *See* Sections 97.3(c), 97.301(b), and 97.305(c) of the Commission's Rules, 47 C.F.R. §§ 97.3(c), 97.301(b), and 97.305(c).

[4] The subbands would total 135 kHz of spectrum. Each subband would be located within that part of the HF band where only Morse telegraphy, RTTY, and data emission types are authorized currently.

[5] The control operator of the automatically controlled station would not be at the control point as is the case with a locally or remotely controlled station. The control operator of the automatically controlled station, therefore, could not monitor its communications and take immediate corrective action as necessary to prevent interference.

[6] *See Memorandum Opinion and Order*, PR Docket No. 85-105, 1 FCC Rcd 166 (1986).

[7] *See Report and Order*, PR Docket No 85-105, 51 Fed. Reg. 3069 (1986). An amateur station that is transmitting on an HF band may be locally or remotely controlled. In either type of control, the control operator is at the control point. *See* Section 97.109 of the Commission's Rules, 47 C.F.R. § 97.109.

[8] Automatic control on VHF and higher frequency bands (above 30 MHz) is authorized currently. *See* Section 97.109(d) of the Commission's Rules, 47 C.F.R. § 97.109(d).

[9] The American Digital Radio Society, Inc., which filed RM-8280, did not file comments. Its views, however, were reflected in the rules proposed in the *Notice*.

[10] Reply Comments of the ARRL at 5.

[11] Comments of the ARRL at 2.

[12] Comment of Ted Colby at 1-2.

shared HF band involves a substantially increased risk of interference.[13] Other comments also express concern with an increased risk of interference.[14] Further, they oppose the establishment of subbands as a solution to the interference concern because subbands would significantly reduce the available spectrum for stations transmitting other emission types.

5. Automatic control of stations transmitting digital emission types enables amateur operators to utilize high-speed computer-based message technology for the rapid and accurate relaying of messages and data. For this reason, we conclude that there has been demonstrated a need for stations in the amateur service to transmit on the HF bands under automatic control. Such operation will result in greater flexibility in experimentation and development of digital communications.

6. We do recognize the concerns of those who oppose the proposal on the basis of potential interference, and in response to these concerns we are limiting when automatic control can be employed. First, the control operator of the station that is connected to the automatically controlled station must prevent the automatically controlled station from causing interference. Second, we are designating subbands to which transmissions between two automatically controlled stations are confined. These subbands are a small portion of the spectrum otherwise available for digital emission types. We also are confident in the ability of the amateur service community to respond, as it has in the past, to the challenge of minimizing interference with novel technical and operational approaches to the use of shared frequency bands.

7. Requiring automatically controlled stations to transmit only in the designated subbands when communicating with another automatically controlled station, furthermore, will not reduce the HF spectrum available for other emission types. The bandwidth of the transmissions of an automatically controlled station will occupy no more than 500 Hz, and the subbands represent only 3.8 percent of the HF spectrum authorized to the amateur service. Other than Morse telegraphy,[15] only digital emission types are currently authorized for the specified subbands. Nothing in the rules that we are adopting prohibits other stations from continuing to share these subbands.[16]

III. CONCLUSION

8. In summary, we are amending the amateur service rules to authorize automatic control of amateur stations. To lessen the possibility of inadvertent interference, the automatically controlled station either must be connected to another station that is under manual control, or the automatically controlled station must transmit only within a subband designated for communications between automatically controlled stations. We believe these rule changes will allow the amateur service community to contribute to communication technology and to advance its communication and technical skills consistent with Section 97.1 of the Commission's Rules, 47 C.F.R. § 97.1. We see this action as fundamental to our commitment to provide maximum flexibility to the amateur service community. Therefore, we will amend the amateur service rules as set forth in the attached Appendix.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that effective **July 1, 1995**, Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Section 4(i) and 303(r)of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

10. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

11. For further information, contact William T. Cross of the Wireless Telecommunications Bureau, Private Wireless Division, (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 97 - Amateur Radio Service

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.109 is amended by revising paragraphs (d) and (e) to read as follows:

§ 97.109 Station control.

* * * * *

(d) When a station is being automatically controlled, the control operator need not be at the control point. Only stations specifically designated elsewhere in this Part may be automatically controlled. Automatic control must cease upon notification by an EIC that the station is transmitting improperly or causing harmful interference to other stations. Automatic control must not be resumed without prior approval of the EIC.

[13] Comments of the ARRL at 2-3, Reply Comments of the ARRL at 3-4.

[14] Comments of Harvey M. Foster at 1, Larry L. Burrs at 1, Lawrence L. Rhodes at 1, Beverly A. Carlson and Gunnar C. Carlson at 1-2.

[15] Morse telegraphy is authorized on all amateur service frequencies. *See* Section 97.305(a) of the Commission's Rules, 47 C.F.R. § 97.305(a).

[16] *See* Section 97.305 of the Commission's Rules, 47 C.F.R. § 97.305.

(e) No station may be automatically controlled while transmitting third party communications, except a station transmitting a RTTY or data emission. All messages that are retransmitted must originate at a station that is being locally or remotely controlled.

3. A new Section 97.221 is added to Subpart C To read as follows:

§ 97.221 Automatically controlled digital station.

(a) This rule section does not apply to an auxiliary station, a beacon station, a repeater station, an earth station, a space station, or a space telecommand station.

(b) A station may be automatically controlled while transmitting a RTTY or data emission on the 6 m or shorter wavelength bands, and on the 28.120-28.189 MHz, 24.925-24.930 MHz, 21.090-21.100 MHz, 18.105-18.110 MHz, 14.0950-14.0995 MHz, 14.1005-14.112 MHz, 10.140-10.150 MHz, 7.100-7.105 MHz, or 3.620-3.635 MHz segments.

(c) A station may be automatically controlled while transmitting a RTTY or data emission on any other frequency authorized for such emission types provided that:

(1) The station is responding to interrogation by a station under local or remote control; and

(2) No transmission from the automatically controlled station occupies a bandwidth of more than 500 Hz.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of

LUCINDA FELICIA PAULOS — File No. BPH-880516MB

JOHN A. CAROLLO, JR. — File No. BPH-880519MX

For Construction Permit for a New
FM Station, Channel 229A (93.7 MHz)
Sebastopol, California

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1995; Released: April 27, 1995

By the Review Board: MARINO (Chairman) and GREENE.

1. A Joint Request For Approval of Settlement Agreement was filed on March 13, 1995, by Lucinda Felicia Paulos and John A. Carollo, Jr. On March 30, 1995, Carollo filed a petition for leave amend, which he supplemented on April 5, 1995. The Mass Media Bureau, in Comments filed March 21 and April 10, 1995, supports the grant of both the joint request and the petition for leave to amend as consistent with the relevant requirements of the Communications Act, Commission rules, and precedent. We will approve the settlement agreement and grant the petition for leave to amend for the reasons discussed below.

2. In a *Decision*, 8 FCC Rcd 8237 (Rev. Bd. 1993), we affirmed the presiding Administrative Law Judge's selection of John A. Carollo, Jr. as the superior comparative applicant. Paulos filed a timely petition for reconsideration, but the Board did not act on it because of the Commission's Public Notice suspending comparative cases. *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994). A third applicant, Manzanita Media, Inc., did not file either a petition for reconsideration or an application for review of our *Decision*, and the Board dismissed Manzanita's application on the ground that its prior denial of Manzanita's application had become final by operation of law. *Lucinda Felicia Paulos*, 9 FCC Rcd 2530 (Rev. Bd. 1994). The Commission denied Manzanita's application for review of the dismissal ruling, 10 FCC Rcd 145 (1995), and Manzanita did not seek judicial review of the Commission's order.

3. In their Joint Request, Carollo and Paulos, the two remaining applicants after nearly seven years of litigation, seek approval of a Settlement Agreement, which, if approved, will result in the grant of Carollo's application and the dismissal of Paulos' application. Carollo will reimburse Paulos for her legitimate and prudent expenditures up to $85,000.

4. The applicants have satisfied the requirements of 47 USC §311(c)(3) and 47 CFR §73.3525(a) that: (a) their applications were not filed for the purpose of entering into a settlement agreement; (b) the public interest will be served by the settlement of this protracted litigation which will authorize the establishment of the first commercial aural service in Sebastopol; and, (c) the proposed settlement payment does not exceed Paulos' legitimate and prudent expenses.

5. The parties also request the Board to vacate the *Initial Decision*, 7 FCC Rcd 3145 (1992), in this case, based on *Shawn Phalen*, 7 FCC Rcd 7638 (1992), and *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642 (1990), and rule that the *Initial Decision* "not bear upon Ms. Paulos' ability to acquire interest(s) in the future, provided that she submit, if necessary, an adequate showing of good character." In its Comments at 2-4, the Bureau supports the parties' request to vacate the *Initial Decision*, but cautions the Board to refrain from issuing a ruling on "what showing Paulos should be required to make concerning her qualifications in the event she applies for a Commission authorization in the future."

6. We will vacate the findings and conclusions of the *Initial Decision* in accordance with Commission precedent recently discussed in *Raymond W. Clanton*, FCC 95R-03, released March 16, 1995, and *Frank Digesu, Jr.*, 9 FCC Rd 7866 at ¶ 7 (Rev. Bd. 1994). We do not believe that the applicants have requested a declaration in advance concerning the showing that must be submitted in the future to establish Paulos' qualifications. Moreover, as contemplated by the Commission's decision in *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373 (1980), questions about a dismissing applicant's basic qualifications need not be resolved prior to approval of a settlement agreement, and will, if necessary, be "revisited in a future proceeding should the applicant again seek to obtain a Commission license."

7. Finally, Carollo has demonstrated good cause for his petition for leave to amend. *See Raymond W. Clanton, supra.* The amendment proposes to substitute a Nevada corporation, Sebastopol Radio Corporation, of which Carollo is the 100% owner, for his individual application. Carollo's amendment also proposes a permissive increase in the effective radiated power of his proposed station. Pet. For Leave to Amend at 2-3. Based on its analysis of the amendment, the Bureau has determined that the engineering proposal "complies with all applicable technical requirements." Comments of April 10 at 1-2. Good cause has been shown for Carollo's engineering amendment which will help resolve the protracted litigation by settlement. *See Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5603-04 (1991).

8. ACCORDINGLY, IT IS ORDERED, That the Joint Request For Approval of Settlement Agreement filed on March 13, 1995, by Lucinda Felicia Paulos and John A. Carollo, Jr. IS GRANTED, and the attached agreement IS APPROVED;

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed March 30, 1995, and supplemented April 5, 1995, by John A. Carollo, Jr., IS GRANTED and that the attached amendment as supplemented IS ACCEPTED; that Sebastopol Radio Corporation is substituted as the applicant; and that the *Initial Decision*, 7 FCC Rcd 3145 (ALJ 1992), IS VACATED; and,

10. IT IS FURTHER ORDERED, That the petition for reconsideration filed December 27, 1993, by Lucinda Felicia Paulos IS DISMISSED; that the application of Lucinda Felicia Paulos IS DISMISSED; that the application of Sebastopol Radio Corporation (BPH-880519MX) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

UNITED STATES INFORMATION AGENCY

For Modification of Authorization

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1995; Released: April 28, 1995

By the Commission:

1. In this Order, we address a request by the Office of Cuba Broadcasting, Bureau of Broadcasting, United States Information Agency ("USIA") that we assign it three UHF channels, Channels 18, 50, and 64, for its use in the Television Marti Service ("TV Marti") and modify its current authorization to specify operation on those channels, in addition to Channel 13, currently authorized.[1] As discussed below, we grant the request.

2. The Television Broadcasting to Cuba Act ("Act") embodies Congress' determination that the national interest would be served by television broadcasts to Cuba.[2] The Act authorizes the Commission to "assign by order a suitable frequency to further the national interests expressed in [the Act], except that no such assignment shall result in objectionable interference with the broadcasts of any domestic licensee."[3] Accordingly, by *Memorandum Opinion and Order,* the Commission in 1991 granted USIA's original request and assigned Channel 13 to USIA for use by its TV Marti facilities.[4]

3. In its current request, USIA notes that it is seeking to modify its authorization to specify operation on Channels 18, 50, and 64, in addition to Channel 13, pursuant to a National Security Council/Policy Coordination Committee Options Paper for the Operation of TV Marti approved and submitted to the National Security Council ("NSC") on November 17, 1992, which authorized USIA to provide NSC with a plan to proceed with implementing UHF broadcasts to Cuba. Before USIA can implement such broadcasts, its current authorization for TV Marti must be modified. USIA further notes that the decision to seek three UHF frequencies is intended to resolve the problems caused by "persistent Cuban jamming" of its VHF transmissions. USIA intends to operate on the three frequencies on a randomly changing pattern to deter Cuban jamming activity. USIA notes that "it will be extremely difficult for the Cuban government to effectively jam a system that is both frequency and space agile," such as it proposes to operate.[5] Further, USIA notes "the need to broadcast during prime audience times." USIA states that: "There is no UHF-TV network in Cuba to be protected and no known services operating on the channels recommended for TV Marti use." According to the Advisory Panel report on TV Marti, since Cuban television does not currently broadcast on UHF, under the terms of the International Telecommunications Convention, "broadcasting to Cuba on UHF frequencies could not be construed as harmful interference' with existing Cuban broadcasting services. *Report of the Advisory Panel on Radio Marti and TV Marti,* Vol. I, March, 1994, p. 9.

4. In accordance with the Act, and for the reasons that follow, we grant the request. While the Act, in Section 243(d)(1), 22 U.S.C. § 1465bb(d)(1), states that we shall assign "a suitable frequency," it does not limit the Commission from assigning more than one frequency since the interpretive provision of 1 U.S.C. § 1, which applies to "any Act of Congress," expressly states that "words importing the singular *include and apply* to several persons, parties, or things" (emphasis added) and, as indicated herein, application of that rule "is necessary to carry out the evident intent of the statute." *See First National Bank of St. Louis v. Missouri,* 263 U.S. 640, 657 (1924); *see also Johnston v. Penrod Drilling Co.,* 803 F.2d 867, 870 (5th Cir. 1986). We note that the Advisory Panel on Radio Marti and TV Marti, appointed by USIA pursuant to Congressional mandate, recommended that TV Marti should convert to UHF transmissions.[6] Acting upon this recommendation, Congress included in appropriations legislation enacted in 1994 "$24,809,000 in expenses for "Broadcasting to Cuba." *See Department of Commerce, Justice, and State, the Judiciary and Related Agencies' Programs for Fiscal Year Ending September 30, 1995,* 1995, Pub. L. No. 103-317, 108 Stat. 1724 (1994). Of this amount, $1,200,000 is specifically provided by Congress "to convert TV Marti from VHF to UHF frequencies." H. R. Conf. Rep. No. 708, 103d Cong., 2d Sess. 92-93 (1994). Thus, we are satisfied that there is no limitation on our granting additional frequencies for use by TV Marti.

5. Further, USIA's engineering study shows that its proposal would not cause objectionable interference to domestic full-power television stations. Section 243(e)(1) of the Act, 22 U.S.C. § 1465bb(e)(1), provides that: "[t]he Television Marti Service shall be governed by the same standards regarding objectionable interference as any domestic licensee." Section 248(3) of the Act, 22 U.S.C. § 1465ff(3), states that "the term objectionable interference' shall be applied in the same manner as such term is applied under regulations of the Federal Communications Commission to other domestic broadcasters...." Section 73.612(a) of the Commission's rules, 47 C.F.R. § 73.612(a), provides that "[t]he nature and extent of the protection accorded to TV broadcast stations is limited solely to the protection which results from the minimum allotment and station separation requirements and the rules and regulations with respect to

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[1] The request by USIA is dated March 30, 1994.

[2] *See* 22 U.S.C. § 1465aa(3). Television Broadcasting to Cuba Act, in Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Part D of Title II, Pub. L. No. 101-246, 104 Stat. 58, Section 242(3).

[3] 22 U.S.C. § 1465bb(d)(1).

[4] *United States Information Agency,* 6 FCC Rcd 1714 (1991). On July 26, 1993, the Commission, by delegated authority, granted USIA a modification of its authorization in order to permit it to reach a broader audience in Cuba. Letter of Roy J. Stewart, Chief, Mass Media Bureau, to Joe Bruns, Acting Director, Voice of America, dated July 26, 1993, 1800E1-PRG.

[5] USIA notes that: "Engineering studies and our own investigations support the feasibility of implementing a system that can shift channels daily by exchanging a small number of frequency determining components."

[6] *Report of the Advisory Panel on Radio Marti and TV Marti,* Vol. I, March, 1994, p. 12.

maximum powers and antenna heights set forth in [the rules]." USIA has presented engineering studies addressing these technical considerations. In particular, the engineering study of Hammett and Edison, Inc., attached to the request, notes that Channels 18, 50, and 64 at Cudjoe Key meet the minimum spacing requirements with respect to domestic full-service TV stations.[7] In addition, the main lobe effective radiated power (ERP) of 23.9 dBk or 245 kW, is less than the 27 dBk or 501 kW permitted by Section 73.612 of the Commission's rules for an antenna height above average terrain (HAAT) of 2300 meters (m) or greater.

6. While complying with the distance spacing and maximum ERP rules could be viewed as fulfilling the Commission's standards regarding objectionable interference, the Hammett and Edison study recognizes that the great transmitting height is not contemplated in the Commission rules and therefore the study addresses potential interference. The Commission's established propagation analysis procedures use curves contained in Section 73.699 of the rules, 47 C.F.R. § 73.699, for transmitting antenna heights up to 1600 m. While the interference effect of the extra transmitting antenna height is not determined, several other factors combine to allow the Hammett and Edison study to conclude that no interference is to be expected. First, the ERP toward domestic TV stations is 1 kW or less, which is at least 27 dB less than the maximum power the rules would allow. Second, the closest co-channel full-service TV station on each of the 3 selected channels is significantly farther from Cudjoe Key than the 329.0 km minimum spacing that the separation rule specifies (WKCF(TV), Channel 18, Clermont, Florida, is 435.7 km; WBHS-TV, Channel 50, Tampa, Florida, is 360.0 km; and WGOX(TV), Channel 64, Inverness, Florida, is 475.8 km. Finally, as noted in the Electromagnetic Compatibility Analysis Center ("ECAC") study attached to the request, the desired-to-undesired ratio that is used for co-channel interference is 17 dB less if offset carrier frequencies are employed than if non-offset carriers are used. To minimize the potential interference, offset carrier frequencies will be specified.

7. The engineering study attached to USIA's request also considers the effect on Low Power Television ("LPTV") Stations and concludes that no LPTV stations would be required to cease operation as a result of the proposed TV Marti facilities. In any event, as the study notes, the FCC's rules provide that LPTV stations are secondary in status to full-power stations. As we stated in our *Report and Order* authorizing the low power television service, "it is our firm intention that low power stations remain secondary, in terms of spectrum priority."[8] Further, under 47 C.F.R. § 74.702(b) of our rules, "[c]hanges in the TV Table of Allotments..., authorizations to construct new TV broadcast stations, or to change facilities of existing ones, may be made without regard to existing or proposed low power TV or TV translator stations."[9] Thus, we do not believe that there is an impediment to authorizing the proposed UHF channels in this regard.

8. Moreover, our goal to promote the development of Advanced Television Service ("ATV"), using digital technology, does not preclude the proposed modification. We note that under Sections 243(d)(2)[10] and 248(2)[11] of the Act, only incumbent domestic licensees, defined as broadcasting a television signal as of January 1, 1989, are protected from being required to change frequency to eliminate objectionable interference from the operation of the TV Marti Service, and ATV facilities would not fall under this provision. Additionally, while we have sought to protect available TV spectrum in major markets to avoid restricting our future decisions with respect to digital broadcasting, we note that we have not yet made any final decision with respect to specific allotments for ATV stations, have not yet issued a Table of Allotments for ATV, and have not adopted transmission standards. Any limiting effect on ATV development is speculative at best since these critical decisions are still in the future. Further, given the remote location of the proposed facilities, we believe we can readily take them into account in designing a Table, if it becomes necessary to do so. We note also in this regard that the TV Marti facilities are not intended to be permanent.

9. Section 243(d)(3) of the Act, 22 U.S.C. § 1465bb(d)(3), states that "For purposes of Section 305 of the Communications Act of 1934, a television broadcast station established for purposes of this [Act] shall be treated as a government station, but the Federal Communications Commission shall exercise the authority of the President under such section to assign a frequency to such station." Based on the directives of the Act, and in response to USIA's March 30, 1994 request, the Commission is hereby modifying USIA's authorization for TV Marti service to permit operation on Channels 18, 50, and 64, in addition to Channel 13. Since no change is being made to the Table of Allotments, notice and comment rule making is unnecessary. In any event, since the change to the TV Marti authorization merely carries out the mandate of the Act and reflects foreign policy determinations made by Congress and the President, we find for good cause that public notice and comment thereon is unnecessary. *See* 5 U.S.C. § 553(a)(1), (b)(3)(B).[12]

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[7] These are contained in Section 73.610 of the Commission's rules, 47 C.F.R. § 73.610.

[8] *See Report and Order* in BC Docket No. 78-253, 51 RR 2d 476, 488 (1982), *on recon.*, 53 RR 2d 1267 (1983).

[9] *See also id.*, 51 RR 2d at 488 n.23 ("... as it is integral to the concept of a secondary service that it yield to a mutually exclusive primary service, we shall not take low power stations into account in authorizing full service stations....")

[10] 22 U.S.C. § 1465bb(d)(2).

[11] 22 U.S.C. §1465ff(2).

[12] We note that the Association for Maximum Service Television, Inc. ("MSTV"), aware that the Advisory Panel's Report, *see* paragraph 4, *supra*, was "to form the basis for an Appropriations-Committee mandated report to Congress from the Director of the U.S. Information Agency by July, 1994," completed an engineering analysis shortly thereafter that was critical of the recommendation in the Report that UHF frequencies be made available for use by TV Marti. A copy of that engineering analysis was provided to the Commission with a transmittal letter, dated June 9, 1994, from MSTV's President. Because Congress, in July of that same year, acted favorably upon the Advisory Committee's recommendation in approving legislation that included appropriations for TV Marti's proposed use of such frequencies, and, moreover, the legislative history indicates that Congress was aware of MSTV's criticisms of the Advisory Panel's Report (in addition to criticisms of that Report by the National Association of Broadcasters) when it adopted the appropriations legislation, *see* 140 Cong. Rec. H4935 (June 23, 1994) (statement of Rep. Skaggs), we see no reason to address or discuss the MSTV study herein.

10. We will not accept applications for construction permits for new stations or modifications to existing stations or petitions for amendments to the Table of Allotments that would interfere with TV Marti's broadcasts to Cuba on these channels. The technical parameters of this authorization, designated to preclude objectionable interference with the broadcasts of any domestic licensee, pursuant to Section 243(e)(1) of the Act, 22 U.S.C. § 1465bb(e)(1), are attached as Appendix A. In order for the Commission to ensure efficient utilization of the spectrum, USIA is requested to advise the Commission of the status of its operation on Channels 18, 50, and 64 on February 1, 1997, and at five year intervals thereafter. Should USIA seek to permanently discontinue its operation on those channels, it should notify the Commission of such intent as soon as possible.

11. Accordingly, IT IS ORDERED, that Channels 18, 50, and 64 are hereby assigned to the United States Information Agency for use by its TV Marti facilities, pursuant to the directives of the Television Broadcasting to Cuba Act.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

Parameters for Broadcasting by the TV Marti Service

I. VHF operation: pursuant to *United States Information Agency*, 6 FCC Rcd 1714 (1991), as modified by the Commission, under delegated authority, by letter of Roy J. Stewart, Chief, Mass Media, Bureau, to Joe Bruns, Acting Director, Voice of America, dated July 26, 1993, 1800E1-PRG.

II. UHF operation

A. Technical Characteristics of the Station

Location: Lat $24^0$40'00"N, Long. $081^0$30'00"W

Frequency: UHF TV Channel 18 (494-500 MHz) with 0. kHz carrier offset; UHF TV Channel 50 (686-692 MHz) with +10. kHz carrier offset; UHF TV Channel 64 (770-776 MHz) with +10. kHz carrier offset

Frequency Stability: ±500 Hz

Transmitter Peak Visual Power: 1,000 watts

Maximum EIRP: 398 kW

Antenna: Parabolic Reflector

Mainbeam gain: approximately 26 dBi

Backlobe maximum gain: -30 dB relative to mainbeam

Antenna height: various heights not to exceed 12,000 feet nominal

B. Operating Conditions

1. The station is not to exceed a maximum EIRP of 398 watts from 320^0 E of true North to 75^0 E of true North in azimuth and from $\pm 90^0$ from horizontal in elevation.

2. NTIA and the FCC will be provided with an on-site point of contact who is responsible for regular operations and who has the authority to discontinue the operations upon notification by NTIA or the FCC.

C. With Limited Assignment

Channels 18, 50 and 64 in the Florida keys are authorized on the condition that they be used exclusively for TV Marti and that each channel will revert to domestic television use under authority of the Federal Communications Commission when its use for TV Marti is terminated.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: April 28, 1995

In Reply Refer To:
1800B3-KDY

Ernest T. Sanchez, Esquire
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4078

In re: KLUV(FM), Dallas, Texas
BTCH-940919GI
Transfer of Control of Station License

BALH-940919GH
Assignment of Station License

Dear Mr. Sanchez:

We have on file: (1) the above-referenced application to transfer control of TK Communications, Inc. ("TK") from Robert K. Weary, James P. Sunderland and Robert Sunderland, *et al.* to John F. Tenaglia (File No. BTCH-940919GI); and (2) the above-referenced application to assign KLUV(FM) from TK to Infinity Broadcasting Corporation of Dallas ("Infinity")[1] (BALH- 940919GH).[2] Also on file is a pleading styled "Petition to Deny Application and to Designate Application for a Hearing" filed by Americans for Responsible Television ("ART") and various opposition and reply pleadings.[3] As set forth below, we grant the subject applications.

Background. ART states that it is a not-for-profit organization founded in Michigan and made up of some "400,000 supporters." In asserting standing, ART attaches two affidavits to its pleading. Marinall H. Turnage ("Turnage"), in an affidavit dated November 1, 1994, states that she is a Dallas resident, a member of ART, that she is "one of the signers of the Anti-Howard Stern Petition prepared by [ART] for submission to the Attorney General of the United States," and that "[a]s one of the signers of [that] petition, I have personal knowledge of the indecency violations broadcast on the Howard Stern Show which form the basis of the petition to deny." In the second affidavit, dated November 3, 1993, Terry Rakolta ("Rakolta") states that she is the founder of ART, that ART "speaks upon behalf of a group of Dallas listeners supporting ART," that "[Turnage] has personal knowledge of the allegations of fact," and that the facts set forth in the ART pleading "are true and correct to the best of my knowledge, information and belief."

ART contends that the Commission should designate the subject assignment application for hearing because Infinity "is an unfit licensee."[4] ART states that the "Commission has determined that on at least twenty-one occasions Infinity violated indecency standards over the last seven years."[5] ART also argues that Infinity "defiantly continues to broadcast indecent material." In support, ART references three 1994 complaints filed with the Commission against Stern broadcasts: (1) a March 4, 1994 complaint against WWKB(AM), Buffalo, New York (the "WWKB Complaint");[6] (2) a March 17, 1994 complaint against WBCN(FM), Boston, Massachusetts (the "WBCN Complaint");[7] and (3) a September 2, 1994 complaint against WRNO(FM), New Orleans, Louisiana (the "WRNO Complaint").[8] ART requests that, in view of Infinity's "continued disregard for the law and the Commission's enforcement measures," the Commission should designate the subject assignment application for hearing.

Infinity argues that the Commission must dismiss ART's petition to deny as procedurally defective for failing to supply an affidavit of an individual with "personal knowledge" of the facts contained in the Petition. Infinity also contends that the Commission must dismiss ART's pleading for being a "strike" pleading, as its primary purpose is to "delay and obstruct the sale of KLUV-FM." In support, Infinity attaches an undated, four-page message from Rakolta to the ART membership (the "ART Message"). The ART Message outlined ART's opposition to the Commission's grant of the assignment of two Maryland stations to Infinity and requested donations to enable ART to file a petition for reconsideration of that decision.[9] The ART Message also stated that the Commission's decision to grant that assignment was wrong in light of Infinity's continued airing of "the pornopgraphic, hate-mongering Howard

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[1] Infinity, through its parent company and various wholly-owned subsidiaries, is the licensee of KVIL(FM), Dallas, Texas and twenty-five other radio stations. We use the term "Infinity" to refer collectively and individually to parent and sister corporations as well.

[2] TK requests that the Commission process both applications simultaneously.

[3] TK's opposition essentially mirrors the arguments framed by Infinity. Therefore, we will incorporate TK's opposition into Infinity's and refer to the oppositions jointly as the "Infinity" response.

[4] ART raises no objection to the above-referenced application to transfer control of TK.

[5] ART alleges that the Commission has issued fines of $1.7 million to Infinity for indecent broadcasts occurring on the Stern program and that Infinity has thus far failed to pay those fines.

[6] The WWKB Complaint, filed under the pseudonym Susan Jones, supplies a tape with edited segments of the following broadcasts: November 17, 1993; December 6, 1993; January 17, 1994; January 19, 1994; January 24, 1994; January 28, 1994; February 10, 1994; February 11, 1994; February 17, 1994; February 18, 1994; and February 22, 1994.

[7] The WBCN Complaint, filed by Paul DeFeo, supplies tapes of Stern broadcasts dated February 4, 1994 and March 3, 1994.

[8] Sheila Potts filed the WRNO Complaint and provides a tape of broadcasts from September 21, 1994 and September 22, 1994.

[9] On May 20, 1994, the Commission granted the assignment of WPGC(AM/FM), Morningside, Maryland from Cook Inlet Radio Partnership to Infinity (File Nos. BAL-931008GQ, BALH-931008GR). In separate requests, dated August 1, 1994 and September 8, 1994, ART requested reconsideration of the WPGC(AM/FM) assignment. By letter dated October 6, 1994, the Commission staff dismissed ART's requests as untimely. *See* Letter from Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau to Ernest T. Sanchez, Esquire.

Stern Show." Rakolta additionally noted that ART's previous opposition to Infinity's purchase of a California station had "cost Infinity millions" and had "delayed" that acquisition. Infinity, citing *Radio Carrollton*, 45 R.R.2d 1273 (1979), states that the ART Message indicates ART's "purpose in filing petitions against Infinity applications is designed primarily to delay or obstruct Commission action."

Regarding the merits, Infinity first states that ART has "distorted" the factual record and Infinity's record as a Commission licensee. Specifically, Infinity argues that the "sole forfeiture" ever levied against Infinity is a $6,000 forfeiture imposed for a December 1988 broadcast. Other than that forfeiture and four pending "non-final" Notices of Apparent Liability ("NALs") against Infinity for Stern program broadcasts,[10] Infinity states that it is "unaware of any notice of apparent liability directed to an Infinity station during its twenty-one year history as a Commission licensee." Infinity also argues that of the 1994 programming excerpts referenced by ART as evidence of Infinity's continued disregard of Commission authority,[11] all except two have already been considered by the Commission in other contexts and either found non-actionable or addressed and disposed of in an NAL. Infinity contends that recent assignment and renewal grants to Infinity indicate that the Commission has correctly found Infinity to be a fully qualified licensee despite the outstanding NAL's[12] and that the remaining two excerpts are non-actionable.

Discussion. We find that ART's pleading is procedurally defective as a petition to deny. Section 309(d)(1) of the Communications Act of 1934, as amended ("Act"), and Section 73.3584 of the Commission's Rules, require that petitions to deny be supported by affidavits or declarations under penalty of perjury from persons with personal knowledge of the facts set forth in the petition. *See Columbia Broadcasting System, Inc.*, 46 FCC 2d 903 (1974). For a national organization such as ART to establish standing, we "require an affidavit by a *person entitled to standing*, indicating that the organization did, in fact, represent a resident or residents of the station's service area and that the petition is filed on their behalf." *North Alabama Broadcasters, Inc.* ("*North Alabama*"), 74 FCC 2d 347, 348 (1979) (emphasis added) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972). Turnage and Rakolta's affidavits - standing alone or in combination - are inadequate to establish ART's standing.

Although Turnage's affidavit appears to satisfy part of the *North Alabama* standard by confirming that Turnage is a member of ART and a Dallas resident, her affidavit fails to establish that she is entitled to standing because it fails to establish that she has personal knowledge of the facts set forth in the Petition. Turnage identifies herself as "one of the signers of the Anti-Howard Stern Petition prepared by [ART] for submission to the Attorney General of the United States . . ." and states that "[a]s one of the signers of [that] petition, I have personal knowledge of the indecency violations broadcast on the [Stern] show which form the basis of the petition to deny the referenced sale." However, Turnage does not state how the facts in the earlier petition relate to the instant Petition, nor does she allege that she has personal knowledge of the program excerpts submitted with the Petition.[13] Furthermore, we cannot ascertain that Turnage even reviewed the Petition, as she signed her affidavit on November 1, 1994, three days before the date appearing on the Petition. Accordingly, we conclude that Turnage has not established standing for herself and therefore cannot establish the requisite standing for ART.

Rakolta's affidavit is also insufficient, as it does not state that she is a Dallas resident or listener of KLUV(FM).[14] *See United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). Even if Rakolta had stated that she was a local resident, her assertion that the facts are true and correct "to the best of my knowledge, information and belief" is inadequate. *See Columbia Broadcasting System*, 46 FCC 2d at 905 (affidavits insufficient where verification is not based upon affiant's personal knowledge). However, despite the fact that the Turnage and Rakolta affidavits are facially defective, we will treat ART's pleading as an informal objection pursuant to 47 C.F.R. § 73.3587. *See Community Television of Southern California*, 46 R.R.2d 1103 (1987) (petition to deny properly treated as informal objection where affiant lacked personal knowledge of the fact alleged).[15]

On a separate procedural point raised by Infinity, we do not find that ART's pleading constitutes a "strike" pleading pursuant to the test set forth in *Radio Carrollton*, 69 FCC 2d 1139 (1978). Under that case, the crucial question is whether a petition is filed for the primary and substantial purpose of delay.[16] *Id.* at 1150. Although the ART Message references that a previously filed opposition did delay an Infinity acquisition, "delay" is not identified as the primary intent of ART's filing. Rather, it is described as an incidental effect. Clearly, ART's stated purpose then, as now, is to

[10] Infinity indicates that it "has respectfully declined to pay" the $6,000 forfeiture. The currently pending NALs against Infinity are: *Sagittarius Broadcasting Corporation*, 8 FCC Rcd 2688 (1992); *Infinity Broadcasting Corporation*, 8 FCC Rcd 6740 (1993); *Infinity Broadcasting Corporation*, 9 FCC Rcd 1746 (1994); and *Infinity Broadcasting Corporation*, 75 R.R. 2d 338 (1994).

[11] *See* notes 6-8 *supra*.

[12] Infinity also suggests that contrary to ART's allegations, "Infinity is not disrespectful of Commission authority." Infinity notes that, as it previously indicated to the Commission, "it has implemented specific measures, including a delay mechanism, monitoring by station management, and regular consultations with communications counsel, in a good faith effort to comply with the Commission's view of the indecency standard."

[13] In its opposition, Infinity states that the Stern program is broadcast in Dallas on station KEGL(FM), Fort Worth, Texas.

[14] Rakolta's affidavit is dated November 3, 1993, which, if correct, means that Rakolta signed the affidavit approximately ten months prior to the filing of the subject assignment application. Because the parties have not raised this issue in the pleadings, we presume that date to be a typographical error.

[15] Contrary to ART's assertions, *D&B Broadcasting Co. , Inc.*, 69 F.C.C.R. 1116, ¶ 4 (1978), does not require that we find Rakolta's affidavit sufficient. It is consistent with that case, however, to treat the ART pleading as an informal objection, just as the pleading in that case -- which also attached a facially defective affidavit -- was treated.

[16] Delay may be shown by a number of factors: (1) statements by the petitioning licensee admitting the obstructive purpose; (2) withholding information relevant to the disposing of the issues; (3) the absence of any reasonable basis for the adverse allegations; (4) economic motivation indicating a delaying purpose; and (5) other conduct of the licensee petitioner. *Id.* at 1151.

raise a legitimate challenge to Infinity's character qualfications, in light of the fines assessed in the pending NALs and the licensee's continued airing of the Stern program. With respect to the subject informal objection, we find that there is no evidence that ART has withheld any relevant information, that the informal objection lacks a reasonable basis, that economic motivation is present, or that any other conduct of ART evidences a primary intent to delay the subject application. Thus, we conclude that the primary and substantial purpose of ART's informal objection is to raise genuine issues relating to character qualifications and that Infinity fails to support its contention that ART has filed a "strike" pleading.

Turning to the merits raised by the informal objection, we disagree with ART that the allegations presented require that we designate the subject assignment application for hearing on the issue of Infinity's fitness to be a licensee. With respect to the cited NAL's, our previous decisions approving the sale of stations to Infinity express our determination that, although Infinity's conduct has warranted the imposition of monetary forfeitures, Infinity remains qualified to be a Commission licensee.[17] Nor do the three 1994 complaints discussed by ART require a contrary result. The staff has determined that the WWKB Complaint and the WRNO Complaint involve material not actionably indecent.[18] The WBCN complaint was recently dismissed because it failed to demonstrate that the materialcomplained of was aired outside the safe harbor period.[19] Having fully considered the allegations presented in the subject informal objection, we find that no substantial and material question of fact has been raised with respect to Infinity's qualification to be or remain a Commission licensee and that Infinity is otherwise qualified.

Conclusion. The petition to deny filed by Americans for Responsible Television IS DISMISSED, and when considered as an informal objection, IS DENIED. The application to transfer control of the station license of KLUV(FM), Dallas, Texas from TK Communications, Inc. from Robert K. Weary, James P. Sunderland and Robert Sunderland, *et al.* to John F. Tenaglia (File No. BTCH-940919GI) IS GRANTED and the application to assign the station license of KLUV(FM), Dallas, Texas from TK Communications, Inc. to Infinity Broadcasting Corporation of Dallas ("Infinity") (BALH-940919GH) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

cc: Steven A. Lerman, Esquire
Thomas J. Hutton, Esquire

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[17] *See* KRTH(FM), Los Angeles, California (File No. BALH-930618GE) and WPGC (AM/FM), Morningside, Maryland (File Nos. BAL-931008GQ, BALH-931008GR).

[18] The WRNO Complaint was dismissed as not actionably indecent by letter dated February 3, 1995. The WWKB Complaint was also dismissed as not actionably indecent, but no letter to that effect was sent as the complainant used a pseudonym and provided no return address.

[19] *See* March 29, 1995 Letter to Paul DeFeo.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Interactive Video and Data Service
(IVDS) Licenses

Requests to Extend Payment Deadline

ORDER

Adopted: April 18, 1995; Released: April 28, 1995

By the Chief, Wireless Telecommunications Bureau:

1. Four winning bidders in the July 28-29, 1994, IVDS auction request a waiver of the Commission's Rules to extend the deadline date for paying the remaining "down payment" on their conditional license grants.[1] For the reasons discussed below, we deny the requests.

2. Section 95.816(c) of the Commission's Rules, 47 C.F.R. § 95.816(c),[2] requires that winning bidders who are eligible and select to pay their winning bid amount in installments submit additional funds to bring the amount on deposit with the government up to 20 percent of their winning bid amount ("down payment") within five (5) business days of the grant of their license application. Non-payment or untimely payment are grounds for invalidating the conditional license and, in addition, imposing monetary penalties.[3] The petitioners are Eagle Interactive Partners, L.P. (Eagle), Albert E. Ervin (Ervin), Interactive Partners of America (IPA), and Bernard Pasquet (Pasquet).[4]

3. Eagle, a winning bidder for three IVDS licenses, has made its final down payment on one of the licenses, and requests a waiver with regard to the other two. Eagle states that it was prevented from making its two payments "due to an unexpected delay in the procurement of funds from debt financing." Ervin, the winning bidder on one license, states, "I have been relying on an individual to assist in funding the second installment and learned last week that he is unable or unwilling to fulfill his commitment to me. I had been trying to contact the individual for several weeks regarding fulfillment of his commitment, but he was unavailable." IPA, the winning bidder on two licenses, failed to make an initial down payment on one license,[5] and now requests a waiver of the down payment with regard to the remaining license. IPA states that "within the past several weeks [a] group of partners decided not to support IPA's IVDS venture. These defections were sudden and unexpected. The remaining partners, constituting a majority, appear willing to proceed [with the venture], and a plan of action is being formulated." Finally, Pasquet, the winning bidder on one license, states, "Since the close of the IVDS auction, my total expenses have increased at a greater rate than my total business and other income. Prior to and at the time of the IVDS auction, I had anticipated generating income from the IVDS license services starting in the first quarter of 1995. This has not occurred."

4. Petitioners make various other arguments in support of their requests. They state that they are working diligently to obtain financing and are willing to pay monetary penalties if the Commission grants their requests. They state, in addition, that it is in the public interest that they be permitted to retain their conditional licenses, rather than have the Commission declare them in default and proceed to re-auction the licenses, because the public will ultimately receive service faster. Finally, they note that they did timely submit their initial down payment, thus, demonstrating their financial backing and good-faith efforts to provide service.

5. Pursuant to Section 1.3 of the Commission's Rules,[6] the Commission may waive a provision of its rules if good cause exists and the grant of the waiver will not undermine the policies embodied in the general rule. *See, e.g., WAIT Radio v. FCC,* 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969), *cert. denied,* 409 U.S. 1027 (1972). Here, we find that the petitioners have not shown that good cause exists to waive the payment rule cited above. As the Commission stated in the *Second Report and Order* in the auctions proceeding, the requirement of a full and timely down payment is intended to ensure that winning bidders "have the financial capability to attract capital to rapidly deploy their systems and operate them in an efficient manner."[7] The requirement of a down payment, in other words, ultimately helps deter defaults: the payment, *inter alia,* discourages "insincere" bidders from winning licenses solely with the expectation that, post-auction, they can "shop" their winning bid in a late effort to obtain financing.[8] Permitting such actions, the Commission has stated, "would undermine the integrity of the auction itself."[9]

6. As noted, the petitioners assert that they were not insincere bidders, and that their financial difficulties were unexpected. We nonetheless do not find good cause to waive the payment deadline. The Commission has taken precautions, including those of requiring financial certifications and down payments, to discourage defaults in the

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[1] The deadline date was either January 25 or March 7, 1995, depending on when the particular license was issued. IVDS auction payment procedures and timetables are discussed in the *Fourth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2330, 2334 ¶ 23-26, 2340 ¶ 53-54 (1994). Here, each winning bidder has claimed that it is a "small business" eligible for the use of installment payments; non-small businesses that had licenses granted on January 18, 1995, were required to pay the balance of their winning bid by January 25, 1995.

[2] *See also* 47 C.F.R. §§ 1.2107(b), 1.2109, & 1.2110(e)(2), (4).

[3] *Id.; see* 47 C.F.R. §§ 1.2104(g)(2), 95.816(c)(4)-(5).

[4] The licensees and filing dates of their requests are as follows: Eagle, filed January 25, 1995; Ervin, March 7 and April 7, 1995; IPA, January 24 and February 6, 1995; and Pasquet, March 9, 1995.

[5] On October 7, 1994, we denied a previous set of waiver requests, requesting, *inter alia,* an extension of an initial down payment deadline of August 8, 1994. *See Order, In re Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses,* 9 FCC Rcd 6384 (Common Carrier Bureau 1994).

[6] 47 C.F.R. § 1.3.

[7] *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2381 ¶ 190 (1994).

[8] *Id.* at 2381-82 ¶ 192.

[9] *Id.*

auction process. Consistent with this objective, we have previously denied requests to extend the IVDS initial down payment deadline, stating that "[t]he Commission ... cannot be responsible for the private business arrangements that an applicant has made to finance its successful bid."[10] More recently, the Bureau determined, in the context of the "upfront payment" rule for auctions of "broadband" Personal Communications Service (PCS) licenses, that a third party's failure to perform its contractual obligation did not constitute a special circumstance justifying a waiver of the deadline date associated with that rule.[11] Here, as in those previous contexts, petitioners could have taken reasonable precautions, such as securing back-up financing, to ensure timely payment in the event of unanticipated difficulties.

7. Accordingly, IT IS ORDERED that the waiver requests of Eagle Interactive Partners, L.P., Albert E. Ervin, Interactive Partners of America, and Bernard Pasquet for extension of the subject IVDS final "down payment" deadline ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[10] *Order, supra* note 5, at 6385 ¶ 11; *see also id.* at 6386 ¶ 13.
[11] *Order, In re Emergency Petition for Waiver of Deadline for Submission of Upfront Payments for Broadband PCS Auction filed by Personal Communications Corporation,* DA 95-37, released January 12, 1995.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Interactive Channel, Inc.

Adjustment of Down Payment for
Interactive Video and Data Service (IVDS)
Licenses

ORDER

Adopted: April 18, 1995; Released: April 27, 1995

By the Chief, Wireless Telecommunications Bureau:

1. Interactive Channel, Inc., participated in the July 28-29, 1994, Interactive Video and Data Service (IVDS) auction and won licenses in three markets, Metropolitan Statistical Areas (MSAs) 245A, 203A, and 248B. MSA Market #245 is located in Ocala, Florida; MSA Market #203 is in Lynchburg, Virginia; and MSA Market #248 is located in Burlington, Vermont. The company timely submitted its $2500 upfront payment at the time of the auction.[1] Its winning bid amounts were $450,000, $130,000, and $80,000, respectively, for a total amount of $660,000.

2. Interactive Channel claimed a small business preference on its FCC Form 175 ("short form") application. Accordingly, Interactive Channel was required to supplement its upfront payment to bring the total amount of money on deposit with the Commission up to 10 percent of its total winning bids ($66,000) by August 8, 1994.[2]

3. After subtracting Interactive Channel's $2500 upfront payment, a down payment balance of $63,500 remained. However, Interactive Channel paid only $61,000 by the August 8, 1994 deadline. When notified of this error by correspondence dated September 28, 1994, from the Commission's Billings and Collection Branch, Interactive Channel promptly paid the $2500 difference.[3]

4. In an oral IVDS auction, a winning bidder that withdraws its bid after signing a bid confirmation form, or fails to remit the required down payment or balance of its winning bid in the time frame specified, is deemed to have defaulted.[4] In the instant situation, however, we are content that the action by Interactive Channel constituted a minor clerical error. In addition, it appears that the oversight harmed no other auction participants or the public. We therefore find that Interactive Channel, having corrected the de minimus financial deficiency quickly, has complied with the payment rule and will not be deemed to be in default.

5. Accordingly, IT IS ORDERED, that the Interactive Channel, Inc., applications for MSA markets 245A, 203A, and 248A ARE ACCEPTED FOR FILING, and will be granted on **May 17, 1995**.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

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[1] IVDS auction payment and procedures and timetables are discussed in the *Fourth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2330, 2334 ¶ 23-26, 2340 ¶ 53-54 (1994).

[2] *See Fourth Report and Order* at 2334 ¶ 25, n.44. Small businesses using installment payments are required to bring their deposits up to 10 percent within five business days after the close of bidding, with the remaining 10 percent due within five days of the license grant.

[3] Interactive Channel's additional $2500 payment was received on October 17, 1994.

[4] *See Fourth Report and Order* at 2335 ¶ 28.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-266

In the Matter of

Review of the Pioneer's
Preference Rules

SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: February 28, 1995; Released: March 1, 1995

Comment Date: March 29, 1995
Reply Comment Date: April 12, 1995

By the Commission:

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Appendix B	Final Regulatory Flexibility Analysis -- Second R&O

I. INTRODUCTION

1. The *Second Report and Order* (*Second R&O*) addresses proposals set forth in the *Notice of Proposed Rule Making* (*Notice*)[1] in this proceeding and modifies certain rules regarding our pioneer's preference program. This program provides preferential treatment in our licensing processes for parties that make significant contributions to the development of a new service or to the development of a new technology that substantially enhances an existing service. These rules will apply to all proceedings in which pioneer's preference requests have not yet been the subject of tentative pioneer's preference decisions.[2] The *Further Notice of Proposed Rule Making* (*Further Notice*) proposes rules in response to the pioneer's preference directives contained in the legislation implementing domestically the General Agreement on Tariffs and Trade (GATT),[3] as well as on our own motion. The GATT legislation requires, *inter alia*, that we complete, within six months of the December 8, 1994 enactment date (*i.e.*, by June 8, 1995), a rulemaking prescribing the procedures and criteria to be used in evaluating pioneer's preference requests accepted for filing after September 1, 1994. We propose to apply the rules adopted in response to the *Further Notice* to any pioneer's preference requests granted after adoption of these rules, regardless of when the requests were accepted for filing, except in proceedings in which tentative pioneer's preference decisions have been made.

II. BACKGROUND

2. Our pioneer's preference rules provide a means of extending preferential treatment in our licensing processes to parties that demonstrate their responsibility for developing new communications services and technologies.[4] Under

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[1] *See* Review of the Pioneer's Preference Rules, *Notice of Proposed Rule Making*, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

[2] *See* n.46, *infra*.

[3] Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), to be codified at 47 U.S.C. § 309(j)(13) (GATT legislation).

[4] The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1993). *See* Establishment of Procedures to Provide a Preference, GEN Docket No. 90-217, *Report and Order*, 6 FCC Rcd 3488 (1991) (*Pioneer's Preference Report and Order*); recon. granted in part, *Memorandum Opinion and Order*, 7 FCC Rcd 1808 (1992) (*Pioneer's Preference Recon. Order*); further recon. denied, *Memorandum Opinion and Order*, 8 FCC Rcd 1659 (1993) (*Pioneer's Preference Further Recon. Order*); *see also Memorandum Opinion and Order on Remand*, ET Docket No. 93-266 and GEN Docket No. 90-314, 9 FCC Rcd 4055 (1994), *appeal pending sub nom. American Personal Communications v. FCC*, No. 94-1549 (D.C. Cir. filed August 10, 1994).

these rules, a necessary condition for the award of a preference is that the applicant demonstrate that it has developed the capabilities or possibilities of a new technology or service, or has brought the technology or service to a more advanced or effective state. The applicant must also demonstrate that the new service or technology is technically feasible by submitting either the results of an experiment or a technical showing. Finally, a preference is granted only if the service rules adopted are a reasonable outgrowth of the applicant's proposal and lend themselves to grant of the preference. A pioneer's preference recipient's license application will not be subject to mutually exclusive applications.

3. The *Notice* sought comment on whether and how the pioneer's preference rules could be amended to take into account our new competitive bidding authority and our past experience administering them, or whether they should be repealed. In the *Notice*, we stated that the pioneer's preference rules were established and have been used in the context of our being limited to random selection and comparative hearings for selecting licensees from among mutually exclusive applicants. We noted that because comparative hearings have tended to be time-consuming and costly for both potential licensees and our staff, and have resulted in delays in providing service to the public, we generally have favored the use of random selection over hearings. We also indicated that the pioneer's preference rules were promulgated to create a significant incentive for innovators to submit proposals for new services and technologies in return for the guarantee of a license, but that the establishment of competitive bidding authority created a new dynamic for the assignment of licenses. Specifically, we stated that a bidder, who may also happen to be an innovator, may now obtain a license directly by outbidding other mutually exclusive applicants, whether by using its own financial resources or by soliciting the aid of financial institutions and venture capitalists. We further noted that Congress authorized use of competitive bidding methods only when multiple, mutually exclusive applications are filed.[5]

4. Based on the above considerations, in the *Notice* we solicited comment on whether our pioneer's preference rules continue to be appropriate in an environment of competitive bidding. Specifically, we solicited comment on whether competitive bidding permits innovative parties to have a reasonable expectation of obtaining licenses and on whether small businesses would be affected differently from other concerns by retention or repeal of the rules. Alternatively, we requested comment on whether, if we retain the preference rules, we should amend them to better work with our competitive bidding authority. Specifically, we solicited comment on alternatives to awarding licenses outright, such as simply designating pioneering parties in a Report and Order establishing a new service or technology, but not guaranteeing these parties licenses; and, as an added incentive, discounting bids by designated pioneers by some specific amount or percentage. We also sought comment on the issue of whether we should require payment for a guaranteed license awarded to a pioneer.

5. Additionally, in the *Notice* we solicited comment on a number of administrative changes to the pioneer's preference rules. We stated that our current policies of issuing public notices specifying filing deadlines, considering raw experimental license material that relates to preference requests, and making initial determinations on preference requests may burden unnecessarily both our staff and the public, and proposed to eliminate these policies. We also proposed that pioneer's preference requests must be filed prior to a notice of inquiry (NOI) in a proceeding that addresses a new service or technology, if such a document is issued in advance of a notice of proposed rulemaking (NPRM), rather than the current policy of allowing requests to be filed after an NOI but prior to an NPRM. We further proposed to limit acceptance of pioneer's preference requests to services that use new technologies, and to clarify that innovative technology is a necessary prerequisite for award.

6. Finally, in the *Notice* we addressed the issue of application of any new pioneer's preference rules to pending pioneer's preference requests. We stated that, as a matter of equity, nothing in the review of the pioneer's preference rules would affect the two pioneer's preferences that already had been awarded to Volunteers in Technical Assistance (VITA) in the non-voice, non-geostationary mobile satellite service below 1 GHz and Mobile Telecommunication Technologies Corporation (Mtel) in the 900 MHz narrowband Personal Communications Services (PCS) proceeding.[6] We solicited comment on whether any repeal or amendment of our rules should apply to three proceedings in which, at that time, Tentative Decisions, but not Orders, had been issued,[7] and we proposed to apply any changes to pioneer's preference proceedings that had not reached the tentative decision stage.

7. The *First Report and Order (First R&O)* in this review proceeding determined that any modifications to the pioneer's preference rules would not be applied to the three

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[5] *See* 47 U.S.C. § 309(j)(1).

[6] *See*, respectively, *Report and Order*, ET Docket No. 91-280, 8 FCC Rcd 1812 (award to VITA); and *First Report and Order*, GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993), *on recon., Memorandum Opinion and Order*, 9 FCC Rcd 1309 (1994) (award to Mtel), *appeal pending sub nom. BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed August 20, 1993).

[7] *See Tentative Decision and Memorandum Opinion and Order*, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992) (pioneer's preferences tentatively awarded to American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint) in the 2 GHz broadband PCS proceeding); *Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration*, CC Docket No. 92-297, 8 FCC Rcd 557 (1993) (pioneer's preference tentatively awarded to Suite 12 Group in the 28 GHz Local Multipoint Distribution Service proceeding); and *Notice of Proposed Rule Making and Tentative Decision*, ET Docket No. 92-28, 7 FCC Rcd 6414 (1992) (no tentative pioneer's preferences awarded in the above 1 GHz low-Earth orbit satellite proceeding). Subsequently, we finalized our pioneer's preference awards to APC, Cox, and Omnipoint in the broadband PCS proceeding; *see Third Report and Order*, GEN Docket No. 90-314, 9 FCC Rcd 1337 (1994), recon. denied, *Memorandum Opinion and Order*, FCC 94-304 (released December 2, 1994); *appeals pending sub. nom, Advanced Cordless Technologies, Inc. v. FCC*, No. 95-1003 (D.C. Cir. filed January 3, 1995); *Qualcomm Inc. v. FCC*, No. 95-1055 (D.C. Cir. filed January 23, 1995); *Advanced Mobile Comm Technologies, Inc. v. FCC*, No. 95-1060 (D.C. Cir. filed January 23, 1995); *Viacom International Inc. v. FCC*, No. 95-1074 (D.C. Cir. filed January 30, 1995).

proceedings in which Tentative Decisions had been issued.[8] Subsequently, however, we decided that both Mtel and any pioneers in these three proceedings must pay for their licenses. In the Mtel licensing order,[9] we stated that we found authority under Section 4(i) of the Communications Act to condition Mtel's license on the payment of an appropriate charge,[10] and required Mtel to pay 90 percent of the lowest winning bid for a comparable license or $3,000,000 less than the lowest winning bid for a comparable license, whichever is less.[11] With respect to the three proceedings in which, at the time the *Notice* was adopted, only Tentative Decisions had been issued, we determined that payment would be required. In broadband PCS, we decided that pioneers who will receive Channel Block A in a Major Trading Area (MTA), must pay either 90 percent of the winning competitive bid for Channel Block B in their MTA or 90 percent of the adjusted value of the license, calculated based upon the average per population price established by competitive bidding for Channel Blocks A and B in the top ten MTAs.[12]

8. The GATT legislation changed the payment formula for broadband PCS pioneer's preference licensees to 85 percent of the adjusted value of each license, calculated based upon the average per population price established by competitive bidding for Channel Blocks A and B in the twenty largest MTAs that do not include MTAs awarded to pioneers. The legislation also prohibited any further administrative or judicial review of the broadband PCS pioneer's preference awards and the license grants based on the awards. With regard to other preference licensees, the GATT legislation requires any such licensees whose pioneer's preference requests were accepted for filing after September 1, 1994 to pay in a lump sum or in installment payments over a period of not more than five years 85 percent of the average price paid for comparable licenses. The legislation also directs the Commission to prescribe regulations specifying the procedures and criteria by which we will evaluate pioneer's preference requests accepted for filing after September 1, 1994, including: 1) specifying the procedures and criteria by which the significance of such a contribution will be determined, after an opportunity for review and verification by experts not employed by the Commission; and 2) such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of a pioneering contribution justifies any reduction in the amounts paid for comparable licenses.[13] The GATT legislation does not apply to licenses issued before August 1, 1994,[14] and it sunsets the pioneer's preference program on September 30, 1998.[15]

III. DISCUSSION – SECOND R&O

A. *Effect of Competitive Bidding Authority*

9. *Retention of Pioneer's Preference Program.* Parties commenting to the *Notice* generally support continuance of the pioneer's preference program. They maintain that the program has encouraged innovation and that competitive bidding does nothing to undermine it. For example, Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (AMT/DSST) states that retention of the pioneer's preference program will further the specific goal articulated in the Budget Reconciliation Act of 1993 (Reconciliation Act) of ensuring the continued participation of small businesses, minorities, women, and rural telephone companies. According to AMT/DSST, the pioneer's preference program has proven successful by unleashing creative energies in the research and development of new communications services and products. AMT/DSST concludes that even if it is assumed that competitive bidding reduces the risks associated with the innovation of new spectrum-based services and technologies, it does not affect the risks associated with the rulemaking process, including the risks of disclosure of innovative new services and technologies through the experimentation, research, and public documentation necessary to support a rulemaking.

10. The Appellant Parties[16] state that competitive bidding does not affect or supplant the significant public interest benefits obtained by the pioneer's preference program. According to these parties, an innovator, having already expended time and resources in developing a new technology or new application of technology, should not be required to participate in any license award competition, whether it be comparative hearing, random selection, or competitive bidding. They contend that it is encouragement to innovation that lies at the heart of the pioneer's preference rules and which serves the public interest. The Appellant Parties conclude that competitive bidding awards the affluent company or investor, not the source of innovative thought and application.

11. Omnipoint argues that there is no incentive for an entrepreneur to innovate if its only reward is the right to bid against large companies in order to be able to use its innovations. Also, in Omnipoint's view, competitive bidding revenue is increased by the public disclosure of ideas that the preference process brings forth. Further, according to Omnipoint, achieving diversity in the ownership of licenses and the provision of services means that other mechanisms besides competitive bidding must be used to allocate licenses. Finally, Omnipoint contends that because we require entrepreneurs to submit petitions for rule mak-

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[8] *See First Report and Order*, ET Docket No. 93-266, 9 FCC Rcd 605 (1994), recon. denied, *Memorandum Opinion and Order*, FCC 94-276 (released November 3, 1994).

[9] *See Memorandum Opinion and Order*, File No. 22888-CD-P/L-94, 9 FCC Rcd 3635 (1994); *appeal pending sub. nom, Mobile Telecommunication Technologies Corp v. FCC*, No. 94-1552 (D.C. Cir. filed August 11, 1994).

[10] *Id.*, 9 FCC Rcd 3643 at ¶ 33.

[11] *Id.*, 9 FCC Rcd 3641 at ¶ 20.

[12] *See Memorandum Opinion and Order on Remand*, *supra* n.4.

[13] Section 309(j)(13)(D) of the Communications Act, as amended, to be codified at 47 U.S.C. § 309(j)(13)(D).

[14] *Id.* § 309(j)(13)(G).

[15] *Id.* at § 309(j)(13)(F).

[16] The Appellant Parties are Adams Telcom, Inc.; Advanced Tel., Inc.; Columbia Wireless Limited Partnership; East Ascension Telephone Company, Inc.; Middle Georgia Personal Communications; Paramount Wireless Limited Partnership; Reserve Telephone Company, Inc; Reserve Telecommunications and Computer Corp.; and Tri-Star Communications, Inc.

ing, thus disclosing their ideas and innovations, competitive bidding without preferences would drive all innovation underground.

12. Arraycomm, Inc. (Arraycomm) and Satellite CD Radio (SCDR) assert that competitive bidding increases the need for pioneer's preferences. In Arraycomm's view, there is no basis for substantive alteration of the rules because the cost to the pioneer of competitive bidding would be added to capital expenditures that it must undertake in developing a new telecommunications technology. According to SCDR, the pioneer has already incurred millions of dollars of debt in the service development and spectrum allocation processes, while the remaining licensees have a significantly reduced cost structure. SCDR concludes that pioneer's preferences and competitive bidding should be seen as solutions to different problems, because preferences encourage improvements in the allocation process, whereas competitive bidding increases the efficiency of initial license assignments.

13. Finally, Ameritech supports broadening the pioneer's preference program, contending that results of the program have been significant. However, Ameritech proposes that we consider awarding preferences based upon a scheme that recognizes gradations of innovative effort. According to Ameritech, such an approach would recognize the relative worth of each pioneer's contribution to the technical art or service under consideration by awarding an amount of spectrum and geographic service area commensurate with the value of the contribution.[17]

14. Those favoring repeal of the pioneer's preference program contend that competitive bidding authority provides a solution to the problem that existed when only random selection and comparative hearing procedures were available to assign licenses. For example, Henry Geller, co-author of the petition for rule making that led to the establishment of the pioneer's preference rules,[18] states that preferences are unnecessary in a competitive bidding environment because competitive bidding permits the party that values a license the most to obtain it without the significant delay and transaction cost involved in random selection. BellSouth maintains that the preference policy does not work and that enactment of competitive bidding legislation eliminates any justification for creating special incentives to innovate. Digital Satellite Broadcasting Corporation argues that our authority to use competitive bidding eliminates the basis for the pioneer's preference rules, and that the rules are unsound as a matter of law and policy. Southwestern Bell Corporation (SBC) asserts that the preference rules are no longer viable because of competitive bidding. In SBC's view, under competitive bidding, the forces of a free market will ensure the proper allocation of spectrum and in so doing encourage financial institutions and backers to advance capital to entrepreneurs whose proposed uses have commercial merit.

15. As discussed under *Unjust Enrichment and Competitive Bidding, infra*, we believe that competitive bidding affects our pioneer's preference program. The GATT legislation directs us to maintain the program until September 30, 1998 for preference requests accepted for filing after September 1, 1994, and we believe that terminating the program for requests filed on or before that date -- even if desirable -- would accord inconsistent treatment to preference requests simply because of the date on which they were submitted for filing. We do not see a valid reason to distinguish preference requests on that basis.[19] Accordingly, we are retaining the program not only for pioneer's preference requests accepted for filing after September 1, 1994, but also for those accepted for filing on or before that date.

16. *Payment by Pioneers.* Several parties commenting to the *Notice* assert that if the pioneer's preference program is maintained, pioneers should be required to pay for their preference grant in services in which licenses are assigned by competitive bidding. Some of those favoring payment contend that a pioneer has an inherent competitive advantage over other entities by virtue of it being guaranteed a license, and that awarding a pioneer its license without payment could give it an insuperable advantage. For example, PageMart, Inc. (PageMart) states that preferences were not intended to result in a financial windfall, that other applicants for licenses are disadvantaged by a preference grantee's ability to capitalize on the certainty of its license, and that these applicants would be further disadvantaged if they were forced to shoulder a substantial financial burden that is not imposed on the grantee.

17. Pacific Bell and Nevada Bell (PB/NB) recommend that in services in which licenses are awarded by competitive bidding, preference grantees pay a fee equal to the lowest winning bid for that geographic area. Other parties state that such grantees should be required to participate in the bidding process. American Portable Telecommunications argues that the Commission should grade innovative proposals and award bid enhancements ranging in size from a low of 5% to a high of 20%, based upon the grade given to each innovator. NYNEX Corporation (Nynex) concurs that it would be inappropriate to exclude preference grantees from competitive bidding. According to Nynex, a firm that has developed an efficiency-enhancing technology or an innovative new service is likely to be willing to pay more for spectrum than a firm that plans to offer traditional services using existing technology. However, Nynex recommends that innovators be eligible for discounts and the same financial arrangements offered to "designated entities" under the proposed competitive bidding rules.[20] In Nynex's view, discounts and other special arrangements are particularly well-suited to promote innovation in the capital-intensive telecommunications industry, in which many innovators are likely to face financial challenges in bringing their technological devel-

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[17] Ameritech filed its comments one day late and accompanied them with a "Motion to Accept Late File (sic) Comments." Because no party opposed this Motion, and in order to ensure a complete record in this proceeding, we are herein granting the Motion, and have considered Ameritech's comments in reaching our decision in the *Second R&O*.

[18] *See* Petition for Rule Making submitted by the Washington Center for Public Policy Research, July 14, 1989.

[19] We also are not modifying the pioneer's preference program in accord with Ameritech's proposal regarding gradations of innovative effort, because we believe that adoption of this proposal would add an unnecessary complication to the program, particularly in services in which licenses are awarded by competitive bidding. As discussed in paragraph 22, *infra*, we are imposing a discounted license charge on pioneers in such services.

[20] *See, e.g.*, Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994).

opments to customers. AMT/DSST states that the Commission may find an adequate basis in the Reconciliation Act to prospectively modify the pioneer's preference rules to assure that the potential rewards of a preference are reasonably related to the financial risks incurred by the preference applicant. According to AMT/DSST, the Commission could award bid preferences to a pioneer in a multiple of the total expenditures incurred in its pioneering activities.

18. Those opposing payment maintain that charging pioneers would eliminate the incentive to develop a new service or technology. They contend that pioneers already have spent large sums of money to obtain preferences and that requiring payment would place them at a competitive disadvantage. For example, Cablevision Systems Corporation (Cablevision) states that pioneers would likely be able to raise capital only by diluting their investments via partnership arrangements with financiers. Suite 12 Group states that since many smaller entrepreneurial entities exist solely by virtue of the technologies that they have pioneered, entry into the marketplace via a pioneer's preference may provide the only means for such entities to recoup their costs. Accel Partners argues that if the Commission chooses to diminish or charge for preference awards, this action would discourage future entrepreneurs and their potential investors.

19. We find persuasive the argument by several commenting parties that not requiring a pioneer's payment would be inequitable to other licensees and would result in a financial advantage to certain competitors in services in which licenses are assigned by competitive bidding. As we stated in the broadband PCS remand order, when we established the pioneer's preference rules "[w]e did not contemplate rewarding an innovator by giving it a license for free while its competitors had to pay, because at that time no one paid for initial licenses."[21] Specifically, as discussed in more detail in the broadband PCS remand order,[22] we are concerned that providing free licenses to pioneers has the potential to distort the competitive bidding process and provide pioneers with a financial advantage over their competitors. Further, we believe that free licenses would contribute toward an uneconomic allocation of the spectrum to the extent that recipients of free licenses do not value the spectrum as much as other bidders, especially where licenses are highly interdependent. Finally, we believe that free licenses could result in "unjust enrichment" to pioneers to the extent that their contributions justify only a discounted spectrum payment. As Congress recently recognized in the GATT legislation, payment by pioneers is "necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses" and to "recover for the public a portion of the value of the public spectrum resource by requiring [each pioneer's preference recipient], as a condition for receipt of its license, to agree to pay [for its license].[23]

20. Although the payment mandate in the GATT legislation does not apply to pioneer's preference requests accepted for filing on or before September 1, 1994, we find the authority to impose license charges on these pioneers in Section 4(i),[24] in conjunction with Sections 1, 303(r), 307, 309, and 214,[25] of the Communications Act. Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." As discussed in both the broadband PCS remand order and the Mtel licensing order, we could not rely upon Section 4(i) to contravene an express prohibition or requirement of the Act, as the language of Section 4(i) itself makes clear. Thus, if any provision of the Act prohibited the Commission from imposing a charge on a pioneer's preference recipient, Section 4(i) would not be an independent basis for such authority. But no provision of the Act addresses this issue, either expressly or implicitly.

21. Further, we find that imposing license charges is necessary in the execution of our licensing functions.[26] First, requiring payment by pioneer's preference licensees is "necessary" to properly carry out our public interest mandate in licensing spectrum-based services[27] inasmuch as an important aspect of the public interest is promoting competition to the extent feasible and taking appropriate regulatory steps to ensure that the competition is fair.[28] As we have found in other contexts, a pioneer's preference license free of charge would likely give the recipient a financial advantage over other licensees competing in the same markets, who would have to pay auction prices -- a result that would not serve the public interest. Second, requiring payment is "necessary and proper" in the execution of our functions under Section 309(j) to implement rational, fair competitive bidding systems. In certain communications services, the values of licenses could be significantly interdependent and thus the prices a bidder might be willing to pay -- or even the willingness to bid at all -- might be affected in various ways by the fact that a potential competitor's license will be available for no charge. For example, with one or more licenses already guaranteed to others free of charge, this might distort significantly the auction for comparable licenses and thereby undermine some or all of the purposes of utilizing competitive bidding. In this regard, we note that the auction statute before enactment of the GATT legislation does not limit our authority to require pioneer's preference recipients to pay for their licenses; it is neutral on this point.[29] Finally, requiring payment will serve Section 309(j)'s purpose of avoiding unjust enrichment, a concept not unique to the GATT legislation's amendments. [30]

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[21] *See Memorandum Opinion and Order on Remand, supra* n.4, at ¶ 10.
[22] *Id.* at ¶ ¶ 9-19.
[23] *See* 47 U.S.C. § 309(j)(13)(D)(ii), (B).
[24] 47 U.S.C. § 154(i).
[25] 47 U.S.C. §§ 151, 303(r), 307, 309, 214(c).
[26] *See Memorandum Opinion and Order, supra* n.9, at ¶ ¶ 26-33 and *Memorandum Opinion and Order on Remand, supra* n.4, at ¶ ¶ 29-34.
[27] *See* 47 U.S.C. §§ 307(a), 309(a), 214(a) and (c). *See also* 47 U.S.C. § 151.
[28] *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 636 and n.27 (D.C. Cir), *cert. denied*, 425 U.S. 992 (1976). *See* also *McLean Trucking Co. v. U.S.*, 321 U.S. 67, 86-88 (1944).
[29] *See* 47 U.S.C. § 309(j)(6)(b); H.R. Rep. No. 111, 103d Cong., 1st Sess. 257 (1993).
[30] *See* 47 U.S.C. § 309(j)(3)(C), (4)(E).

22. We therefore will impose a discounted license charge on pioneers in services in which licenses are awarded by competitive bidding. We find that the most equitable way to do this for all pioneers that have not yet received a license is to use the payment formula specified in the GATT legislation; *i.e.*, pioneers will be required to pay in a lump sum or in installment payments over a period of not more than five years 85 percent of the average price paid for comparable licenses. While this legislation applies only to pioneer's preference requests that were accepted for filing after September 1, 1994, for reasons similar to those discussed in paragraph 15, *supra,* we find that applying a different payment formula to requests filed on or before that date would accord inconsistent treatment to requests simply because of their filing date. We do not see a valid reason to distinguish preference requests on that basis. The GATT legislation also provides the Commission discretion, except in the case of broadband PCS, to identify licenses that are "most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to the [pioneer's preference recipient], and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment."[31] We intend to apply the same type of comparable license analysis in the pending pioneer's preference proceedings if any preferences are awarded.

23. We reject the proposals offered by American Portable Telecommunications and Nynex to require preference grantees to participate in the competitive bidding process while allowing them discounts and special financial arrangements. As noted above, we have decided to maintain the pioneer's preference program and to continue to guarantee a license to preference recipients. Accordingly, we will continue to preclude the filing of mutually exclusive license applications against pioneer's preference recipients, thus exempting these licenses from competitive bidding procedures.[32] We believe that allowing pioneers the certainty of obtaining licenses rather than forcing them to participate in competitive bidding with a credit will provide some of the necessary certainty to obtain the financing necessary for their investments and will also encourage them to make the showings necessary to obtain preferences. We note that these showings may entail the disclosure of certain proprietary information that can lessen the value of innovations and increase the value of licenses to others.

B. *Administrative Amendments to the Pioneer's Preference Rules*

24. *Filing Timelines and Elimination of Public Notices and Tentative Decisions.* Parties commenting on the *Notice* support our proposal regarding filing timelines, as well as our proposals to eliminate the current procedures of issuing public notices that specify filing deadlines and making initial determinations on pioneer's preference requests. Arraycomm states that changing the administrative rules as proposed appears to comport with our pioneer's preference objectives, and In-Flight Phone Corporation (In-Flight) maintains that we may appropriately streamline the rules to define more clearly those parties whose innovations are entitled to preferences and to change the manner in which preference applications are processed. More specifically, AMT/DSST asserts that tentative decisions improperly determine preference grantees at an early stage, and that preferences should not be awarded until final rules have been issued. Similarly, Cablevision endorses the elimination of early comments on preference requests before issuance of proposed rules. According to Cablevision, what appear to be promising technologies at the early stages of development of a service may have little relevance as the service comes closer to fruition.

25. We concur with commenting parties that we should eliminate our procedure of issuing public notices specifying filing deadlines and making initial determinations on preference requests at the NPRM stage of a proceeding that addresses use of a new technology or service. We originally imposed these requirements to ensure a complete record in all pioneer's preference proceedings. However, the burden imposed by these requirements in prior proceedings convinces us that eliminating them will result in a more efficient process with no detriment to the public. We also find it in the public interest to require that preference requests be filed prior to an NOI, if such a document is issued in advance of an NPRM. Deferring the filing deadline to the NPRM stage in cases in which an NOI has been issued may encourage speculative pioneer's preference requests.[33] Each preference request complying with revised Section 1.402 of our Rules will be listed without evaluation in the NPRM, and comment will be solicited on each request.[34] A determination on whether to grant a preference request will normally be made in a Report and Order, if such an Order authorizes use of a new technology or service.[35]

26. *Summaries of Experimental Data.* The commenting parties were generally silent on our proposal to require preference applicants to be more selective in submitting experimental license material that relates to preference requests. However, those parties that did address this issue support our proposal. For example, Arraycomm states that the proposal appears to comport with our stated objective of streamlining the pioneer's preference rules. In-Flight offers general support for this proposal and our other administrative proposals, to help eliminate frivolous preference requests and reduce our regulatory burden.

27. We will adopt our proposal to require pioneer's preference applicants to incorporate only relevant experimental material into its preference request, rather than submitting its entire experimental file as part of the re-

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[31] 47 U.S.C. § 309(j)(13)(B)(i), (iv).

[32] *See* 47 U.S.C. § 309(j)(1), (j)(13)(D).D

[33] To be eligible for consideration for a preference, a preference request must be submitted prior to the Sunshine Notice announcing consideration of the NOI or NPRM at an agenda meeting. In the case of a non-agenda (circulation) NOI or NPRM, the preference request must be submitted prior to submission of the NOI or NPRM to the Commission for vote.

[34] We note that in the Digital Audio Radio Services (DARS) proceeding, GEN Docket No. 90-357, while no tentative decision has been adopted regarding pioneer's preference requests, a *Report and Order* has been issued allocating spectrum for satellite DARS; *see* FCC 95-17, released January 18, 1995. Also, a *Public Notice* establishing a filing deadline for the submission of satellite DARS pioneer's preference requests has been issued; *see* 8 FCC Rcd 3167 (1993). Accordingly, there is no further opportunity to submit satellite DARS pioneer's preference requests.

[35] In some circumstances, it may not be possible to make a pioneer's preference determination at the time of the Report and Order. In those circumstances, the pioneer's preference determination will be made as soon as feasible after the Report and Order.

quest. In its preference request, an applicant will be required to specifically document the technical feasibility of an innovation with respect to a new technology or service. If the applicant has performed experimental testing and wishes to make that testing part of its technical feasibility showing, it will be required to summarize the testing in its request, specifically addressing how the underlying experimental data support its showing. The underlying data will typically be made available for public inspection as part of the separate experimental license file so that interested parties (or Commission-appointed experts) may examine such data as it relates to the summary prepared in support of the preference request.

28. *Innovative Technology*. Comments were mixed on our proposal to limit acceptance of pioneer's preference requests to services that use new technologies, and to clarify that innovative technology is a necessary basis for award. PB/NB and Omnipoint state that they agree with this proposal, and BellSouth states that not only should a new technology be required, but that any preference should be conditioned on use of the technology for which the preference was awarded. PageMart concurs that preference grantees should be required to build the systems for which they have received preferences. However, CELSAT, Inc. (Celsat) argues that it is difficult to determine what constitutes a new technology. Therefore, Celsat maintains that we should continue to examine each preference request to determine whether it represents significant technological and/or service innovations. Motorola Satellite Communications, Inc. (Motorola) asserts that a service not currently provided or a significant enhancement of an existing service can be achieved not only through the development of new technologies, but also by combining existing technologies in new and innovative ways. PCN America, Inc. (PCNA) maintains that there is no justification for refusing to give a preference based on innovative proposals for new services. According to PCNA, to some extent technological innovation already has its own reward in the patent and licensing process, whereas new services do not reap any reward other than in the pioneer's preference process. Qualcomm, Inc. (Qualcomm) proposes that the Commission specify the exact nature of the technology it deems pioneering and clarify that an innovative technology that can be applied to more than one service is eligible for a preference in all services that are not existing at the time the preference request is filed. Finally, PageMart recommends that a preference grant be limited to the principal geographic area in which experimental testing was performed.

29. Based on the record, we believe that a change in policy to limit acceptance of pioneer's preference requests to services that use new technologies is unnecessary. We agree with Celsat that, in some instances, it may be difficult to evaluate whether a technology is new, and we agree with Motorola that a new communications service or a significant enhancement of an existing service may, under some circumstances, be achieved by combining existing technologies in new and innovative ways. Thus, we will retain our rule that provides that preferences are available for new services or enhancements to existing services through the use of innovative technologies.[36] However, we will continue to deny preference awards in new services to parties simply for transferring existing technologies from existing services in one band to similar services in another band.[37] Such proposals will not be considered innovative under the rule.

30. With respect to Qualcomm's recommendation that we specify the exact nature of the technology we deem pioneering, we have consistently done this in each pioneer's preference proceeding. Both our tentative and final decisions have detailed the technologies we have found pioneering, as well as our other reasons for awarding preferences.[38] Regarding Qualcomm's recommendation that we clarify that an innovative technology that can be applied to more than one service is eligible for a preference in all services that are not existing at the time the preference request is filed, we disagree. Once a pioneer's preference has been granted for a service that uses a new technology, that technology is no longer new. While it is obviously beneficial to the public if a technology can be used in more than one service, our goal in establishing, and continuing to maintain, the preference rules is not to repeatedly reward the same innovation. We find that granting a pioneer's preference in the first service that was developed or enhanced by the innovative technology is sufficient incentive to encourage proposals to be submitted.

31. With regard to BellSouth's and PageMart's recommendations that any preference grant should be conditioned on use of the technology and system for which the preference was awarded, we agree that this change to our rules is desirable. We believe that this change will ensure that preference applicants do not propose technically sophisticated but economically impractical communications systems, and preserves the integrity of the pioneer's preference program. We note that we have already applied this policy for both broadband and narrowband PCS preference grants.[39] Clearly, if a party is a pioneer of a new technological system, the party should be rewarded only if in practice that system is viable. In addition, we are also codifying the requirements mandated for both narrowband and broadband PCS licensees that transfers of pioneer's preference licenses be prohibited until specified build-out requirements have been met.[40]

32. We disagree with PageMart's recommendation that a preference grant be limited to the principal geographic area in which experimental testing was performed. While in most cases a preference grant will be for the principal experimental area, in some cases an experiment may be

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[36] *See* 47 C.F.R. § 1.402(a). We note that in para. 51, *infra*, we are proposing to eliminate pioneer's preferences for services that do not require a new spectrum allocation.

[37] In the broadband PCS proceeding, for example, we denied several pioneer's preference requests because they were merely compilations or aggregations of existing communications technologies or systems already being used in other communications services and thus were not innovative proposals. *See Tentative Decision and Memorandum Opinion and Order, supra* n. 7, at ¶ 26; and *Third Report and Order, supra* n.7 , at ¶ ¶ 96, 138, 175, 181, 190, 215, 235, 237, 249, 275, 293, and 301. Further, in the above 1 GHz low-Earth orbit satellite proceeding, we tentatively denied all five pioneer's preference requests for similar reasons. *See Notice of Proposed Rule Making and Tentative Decision, supra* n.7, at ¶ ¶ 36, 39, 43, 46, and 49.

[38] *See*, for example, *Third Report and Order* in the broadband PCS proceeding, *supra* note 7, at paras. 1 and 10-74.

[39] *See*, respectively, *Third Report and Order*, GEN Docket No. 90-314, *supra* n.7, at ¶ 8; *Memorandum Opinion and Order*, GEN Docket No. 90-314 and ET Docket No. 92-100, *supra* n.6, at ¶ 47.

[40] *See Memorandum Opinion and Order, supra* n.6, at ¶ 50; and *Third Report and Order, supra* n.7, at ¶ 9.

unnecessary.[41] In other cases, the grantee may find it more desirable to perform an experiment in other areas where it may not desire or qualify for a pioneer's preference license.[42] We emphasize, however, that applicants must specify the area for which a preference is sought and may obtain a preference for only one area.[43]

C. *Pending Pioneer's Preference Requests*

33. Several commenting parties state that applying any modifications to the pioneer's preference rules to pending requests would unfairly penalize applicants that filed preference requests under the current rules. For example, In-Flight asserts that these applicants risked time and money to develop innovative proposals in reliance on rules that had been designed specifically to encourage such risk-taking. Celsat concurs, and contends that if any pending application merits a preference under existing rules, the Commission should grant it with all the rights currently associated with a grant. Arraycomm argues that it would be inequitable to retroactively impose new rule changes on preference requests that were on file prior to adoption of the *Notice*.

34. Other parties argue that it would be appropriate for the Commission to apply modifications to the pioneer's preference rules to existing proceedings. For example, Nextel Communications, Inc. (Nextel) states that not only can we apply modifications to the pioneer's preference rules to existing proceedings in which Tentative Decisions have not been made, but under the notice and comment rule making-type procedures involved, we are free to revise, modify, and reverse tentative conclusions based on the record developed in response to our solicitation for comments. Paging Network, Inc. states that under established legal precedent, we have the authority to change the eligibility rules to the detriment of pending applications, and PageMart asserts that Congress has made clear that we have broad discretion to modify the preference system in light of competitive bidding authority, and that this discretion includes the authority to change the nature of the award or the conditions precedent for receipt of the award.

35. We concur with those parties who contend that we are not legally permitted to engage in retroactive rule making (except in cases in which a statute explicitly permits such rule making). However, we disagree that applying the modifications that we have adopted herein to pioneer's preference requests that have not reached the Tentative Decision stage constitutes retroactive rule making. As discussed by Nextel, under the notice and comment rule making-type procedures involved, we had the clear legal authority to apply rule modifications to the three Tentative Decisions discussed in the *First R&O*,[44] and ultimately did so.[45] Applying amended rules to preference requests that have not reached the Tentative Decision stage is even more obviously within our legal authority.

36. Additionally, we find it equitable to apply new rules to these proceedings. Each of the parties in these proceedings applied for a pioneer's preference before competitive bidding was authorized; therefore, none of these parties applied for a preference on the basis that it would receive for free a license for which others would have to pay. Further, since none of these parties has been awarded even a tentative preference, no party can claim that it had received the expectation of an award under existing pioneer's preference rules and that it therefore had reason to believe that changes to these rules would not apply to them.[46]

IV. DISCUSSION – FURTHER NOTICE

A. *Implementation of the GATT Legislation*

37. Section 309(j)(13)(D) of the Communications Act, as amended by the GATT legislation, provides that:

> the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the develop-

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41 *See Pioneer's Preference Recon Order, supra* n.4 , at ¶ 10.d

42 *See Establishment of Local Multipoint Distribution Service, CC Docket No. 92-297, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 8 FCC Rcd 557, 566 ¶ ¶ 64-65 (1993) (tentative award to Suite 12 group).

43 *See* 47 C.F.R. §§ 1.402 and 5.207.

44 For a discussion of court cases related to retroactive rulemaking, *see First R&O, supra* n.8 , at n.24.

45 *See Memorandum Opinion and Order on Remand, supra* n.4.

46 The following companies submitted pioneer's preference requests on or before September 1, 1994 that are pending: 1) AfriSpace, Inc., filed 7/30/91, not placed on public notice (International Satellite Sound Broadcasting); 2) Crescomm Transmission Services, Inc., filed 12/12/91, placed on public notice 3/11/92 (PP-34 in RM-7912) (Digital Shipboard Earth Stations); 3) Cruisecom International, Inc., filed 4/10/92 in RM-7912, not placed on public notice (Digital Shipboard Earth Stations); 4) Digital Satellite Broadcasting Corporation, filed 6/2/93 in GEN Docket No. 90-357, not placed on public notice (Satellite Digital Audio Radio Services); 5) In-Flight Phone Corporation, filed 10/30/92, not placed on public notice (Air/Ground Audio Service); 6) Inner Ear Communications, Inc., filed 5/21/93, not placed on public notice (Low-Power Audio Service); 7) Primosphere Limited Partnership, filed 6/2/93 in GEN Docket No. 90-357, not placed on public notice (Satellite Digital Audio Radio Services); 8) ProNet Inc., filed 7/30/91, placed on public notice 1/31/92 (PP-23 in RM-7784) (Electronic tracking service); 9) Satellite CD Radio, Inc., filed 7/30/91, supplements filed 1/23/92 and 6/2/93, original request and first supplement placed on public notice 1/31/92 (PP-24 in GEN Docket No. 90-357) (Satellite Digital Audio Radio Services), second supplement not placed on public notice; and 10) Strother Communications, Inc., filed 7/30/91, placed on public notice 1/31/92 (PP-25 in GEN Docket No. 90-357) (Terrestrial Digital Audio Radio Services).

Additionally, pioneer's preference requests were filed after September 1, 1994 by Nextel Communications, Inc., on October 6, 1994 (Specialized Mobile Radio); and by Holmdel Telecommunications Group, Inc., on December 8, 1994 (Digital Shipboard Earth Stations) (Holmdel states that it is the successor-licensee to Crescomm Transmission Services, Inc. in the provision of on-going broadband maritime experimentations; *see* Request for Pioneer's Preference, at 4).

Action on all of the above requests, as well as on any other requests that may be received prior to the conclusion of the instant rulemaking proceeding, will be deferred until the proceeding is concluded.

ment of a new service or to the development of new technologies that substantially enhance an existing service.

Such regulations shall--

> (i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment; [and] (ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection.[47]

Section 309(j)(13)(B) provides that:

> The Commission shall recover for the public a portion of the value of the public spectrum resource made available to [a pioneer's preference recipient] by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--
>
> (i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;
>
> (ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);
>
> (iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);
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> (iv) reducing such average amount by 15 percent; and
>
> (v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.[48]

Section 309(j)(C) states that the Commission shall require pioneer's preference recipients to pay the sum required by the above formula in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.[49]

38. *Procedures and Criteria.* We tentatively conclude that, with the exceptions of the two areas discussed below, the existing pioneer's preference rules, as modified in this *Second R&O*, comply with the GATT legislation's requirement to specify procedures and criteria by which to evaluate pioneer's preference applications. They set forth specific requirements to inform pioneer's preference applicants of the procedures with which they must comply in order to be considered for a preference and, we believe, also give the Commission predictable guidelines to follow in determining whether a given proposal is innovative.[50] However, we solicit comment regarding any alternatives to any aspects of these general rules and procedures that might better achieve the objectives of the GATT legislation.

39. *Peer Review.* The GATT legislation's directive that the Commission establish a procedure for review and verification by outside experts was contemplated as an optional measure by our current pioneer's preference policies. In the *Pioneer's Preference Report and Order*, we stated that "peer review" may be used on a case-by-case basis.[51] We propose to formalize this policy pursuant to the GATT legislation to provide an "opportunity" for peer review of potentially pioneering proposals by experts in the radio sciences who are not Commission employees. We seek comment on whether such review by outside experts should be required in all cases or whether pioneer's preference applicants (or other interested parties) should be given only an "opportunity" for such review, which may be either accepted or declined by the applicants.

40. With regard to whether review by outside experts is mandatory under GATT, we seek further comment on the possible interpretations of the other component of this provision relating to "any applicant for such preferential treatment." First, Section 309(j)(13)(D)(i) could be interpreted to mean that our rules must provide *either:* (1) an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission; *or* (2) an opportunity for review and verification by any applicant seeking a pioneer's preference. Second, the section could be interpreted to mean that our rules must provide an opportunity for review and verification by experts in the radio sciences drawn from among persons who are *neither* employees of the Commission *nor* employees of any applicant seeking a pioneer's preference. The first interpretation would appear to expand the Commission's discretion as how to proceed with the "review and verification" of the merits of pioneer's preference requests, whereas the second interpretation would impose an additional measure to prevent potential conflicts of interest in the evaluation of preference proposals.

41. While we seek comment on which of these interpretations is correct, we nevertheless tentatively conclude that, employing aspects of both interpretations, it would be

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47 47 U.S.C. § 309(j)(13)(D).
48 *Id.* § 309(j)(13)(B).
49 *Id.* § 309(j)(13)(C).
50 *See* 47 C.F.R. Section 1.402, as modified herein.
51 *See* n.4, *supra*, 6 FCC Rcd 3494 ¶ 50.

desirable to establish a peer review process on a permanent basis. In this regard, we propose to delegate to the Chief of the Office of Engineering and Technology ("Chief, OET") the authority to select a panel of experts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request and who are neither employed by the Commission or by any applicant seeking a pioneer's preference in the same or similar communications service. Based on our experience with the pioneer's preference program, we tentatively conclude that the outside expertise required to evaluate the claims made in pioneer's preference requests will vary greatly; *e.g.*, in some cases one or two individuals may be able to sufficiently evaluate the claims made in a very short period, whereas in other cases several individuals may need to spend a substantial amount of time to sufficiently evaluate the claims and report to the Commission. Accordingly, we believe that our staff should evaluate on a case-by-case basis how much outside assistance is required and solicit such assistance. While we could empanel a permanent pool of experts from which one or more persons could be selected in a given case depending on their area of expertise, we are of the tentative view that, given the wide array of potential new technologies and services which we may now not anticipate, it would be preferable to allow the Chief, OET to select experts from all available sources after reviewing the proposed new technology or service.

42. Once empaneled, we propose that the experts would generally be granted a period of up to 180 days to present their findings to the Commission. We seek comment on whether we should generally seek the experts' individual opinions or their consensus (as a Federal Advisory Committee under the Federal Advisory Committee Act). We tentatively conclude that the Commission should not be bound to follow the recommendations of the panel, but that it should evaluate the recommendations in light of all the submissions and comments in the record. However, we solicit comment on whether the views of the panel (especially where consensus is reached) should be entitled to greater, or perhaps controlling, deference. We also seek comment on what restrictions, if any, the panel members should have vis-a-vis contact with the applicants; *e.g.*, whether they should have authority to seek further information pertaining to the preference request or to perform field evaluations.[52] We also seek comment on any additional conflict of interest requirements (*e.g.*, related to financial interests) we should impose upon outside experts.

43. *Unjust Enrichment and Competitive Bidding.* The GATT legislation requires continuation of the pioneer's preference program through September 30, 1998, and directs the Commission to identify comparable licenses and apply the payment formula set forth in section 309(j)(13)(B)(i)-(v) to determine how much to charge a pioneer's preference recipient for its license. In addition, Section 309(j)(13)(D)(ii) provides that our implementing regulations must include "other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses." Our concerns about unjust enrichment are lessened by the statutorily-mandated payment requirement for pioneer's preference grantees in auctionable services and the formula for calculating per capita bid amounts. Nonetheless, we remain concerned about the effect of competitive bidding on the pioneer's preference program.

44. The awarding of pioneer's preferences was designed to induce companies to undertake the risky research and development necessary to introduce new and innovative services to consumers. In contrast to other portions of the economy, these innovations require access to spectrum to appropriate the rewards of the risky upfront investment. In some instances, patents may provide innovators with sufficient protection and profitability so that they will have an incentive to innovate. For example, a number of the companies that did not receive pioneer's preference awards in broadband PCS are attempting to market their technologies to other potential licensees and are able to compete in the marketplace as suppliers rather than as licensees. However, in other instances, it may not be possible to fully realize the rewards by simply being a supplier. In those cases, our pioneer's preference grants, which ensure that innovators can become licensees, may help to stimulate innovation.

45. In services in which we use competitive bidding to assign licenses, the need to guarantee a license may not be as strong as in services where another assignment method is used. For example, if an innovator has a valuable idea and can capitalize on it by obtaining a license in a service in which licenses are awarded by competitive bidding, it should not be eligible for a pioneer's preference. Such an applicant is able to obtain the financing for both the innovative research and the license acquisition cost. Further, if the rewards of the innovation do not cover both the research and the license costs, the innovation may not be socially beneficial, and it may be undesirable for the Commission to subsidize these costs by awarding pioneer's preference licenses at below market values.

46. We also note that there may be circumstances in which our guarantee of a license at or close to market price may stimulate research such that the innovator receives certainty in obtaining financing to perform the necessary research and to pay for the license. In services in which licenses are not awarded by competitive bidding, the combination of the riskiness of innovative research into new techniques and services combined with the riskiness of obtaining a license may make financing more difficult. However, in services in which licenses are awarded by competitive bidding, investors are assured that innovators will receive licenses at or near the price others pay for comparable licenses. This may encourage financing because investors know that the innovator is less likely to overpay for its license.

47. Accordingly, because competitive bidding affects our pioneer's preference program, to qualify for a pioneer's preference in services in which licenses are awarded by competitive bidding, we seek comment on an additional showing by a preference applicant. Specifically, we seek comment on whether the applicant should have to demonstrate that our public rulemaking process, which re-

[52] We note that if a pioneer's preference request is formally opposed, the proceeding pertaining to that request becomes restricted and *ex parte* presentations are prohibited. *See* 47 C.F.R. Sections 1.1202(e) and 1.1208(c). The great majority of pioneer's preference requests have been formally opposed.

quires the innovator to disclose proprietary information, inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license; *i.e.*, whether the applicant must show that it may lose its intellectual property protection because of our public process. We note that in many other contexts, including the patent area, innovation is also subject to imitation or other competition. Therefore, we seek comment on whether the applicant should show that the damage to its intellectual property protection is more significant than in these other contexts. If this requirement were to be adopted, the applicant would have to demonstrate that it would be able to capture the rewards from its innovation only by being granted a guaranteed license. This requirement would be in addition to the other requirements specified in Section 1.402 of our Rules.

48. We are aware that in most instances it will be unclear when a pioneer's preference request is filed whether assignments in the proposed service will be made by competitive bidding or some other method. We therefore seek comment on whether in its pioneer's preference request each applicant should make the above-described demonstration regarding intellectual property protection to ensure that it will retain its eligibility for a preference.

49. *Payment Formula.* With regard to determining which licenses are most reasonably comparable under Section 309(j)(13)(B)(i), we must necessarily implement this provision on a case-by-case basis. Nevertheless, we seek comment on any standards for comparing licenses and excluding anomalous licenses that we might codify into our rules along with the statutory formulas for determining the average "per capita bid amount" and the payment amount. Finally, we seek comment on the implementation of the installment payment provision in Section 309(j)(13)(C). We tentatively conclude that, as in our competitive bidding proceeding, we will not adopt any installment payment scheme that includes royalty payments.[53] We seek comment on whether eligibility for installment payments should be limited to small businesses or other entities as we have done in our general auction rules.[54] We propose that, if an entity receiving a pioneer's preference award and license in a particular service would be eligible for installment payments in the auction for that service, that entity should be able to pay for its pioneer's preference license in installments under similar terms and conditions. Thus, for example, interest rates and enhancements such as interest-only payment periods would be comparable to those of other similarly situated licensees that obtain their licenses at auction (but without the pioneer's preference 15 percent discount). However, in accordance with the GATT legislation, a pioneer's installment payment term (if the pioneer is eligible) could not exceed five years.[55] We propose to require a pioneer's preference licensee that is not eligible for installment payments to pay in one lump sum within a reasonable time (*e.g.*, 30 days) after the auction for comparable licenses has concluded or after the license grant becomes final, whichever is later.

B. *Other Matters*

50. In accord with the GATT legislation, we propose to sunset the pioneer's preference program on September 30, 1998. Between now and that date, we would continue to evaluate the program and, if warranted, retain it. Comment is requested on the utility of the program, particularly in light of our new competitive bidding authority. One option would be to retain the program only for services in which licenses are not awarded by competitive bidding.

51. We also propose to modify our pioneer's preference rules by limiting the award of preferences to services in which a new allocation of spectrum is required.[56] Our experience with the pioneer's preference program convinces us that awarding preferences for enhancements of existing services where no new spectrum allocation is required is contrary to the public interest. Such a policy encourages developers of a technology that can be used in a variety of existing services to apply for a pioneer's preference in each of those services.[57]

52. We propose to apply the rules adopted in response to the *Further Notice* to any pioneer's preference requests granted after adoption of these rules, regardless of when the requests were accepted for filing, except in proceedings in which tentative pioneer's preference decisions have been made. Although the GATT legislation does not apply to pioneer's preference requests accepted for filing on or before September 1, 1994, we find the authority to apply any rule changes adopted in response to the *Further Notice* to these pioneer's preference requests in Section 4(i), in conjunction with Sections 1, 303(r), 307, 309, and 214, of the Communications Act. We will not issue final decisions in pioneer's preference proceedings that have not reached the tentative decision stage until after we issue a Third Report and Order in this proceeding regarding final rules that will apply to pending requests.

V. CONCLUSION

53. In view of our new authority to use competitive bidding to assign licenses and our experience administering the pioneer's preference rules, we are modifying these rules to better comport with competitive bidding and our experience. We believe that the changes we are adopting will increase the efficiency of the pioneer's preference program. We emphasize that these changes strengthen the pioneer's preference program, which is to reward innovators of new spectrum-using services and technologies by granting them a significant benefit in our licensing processes. To comply with the recently-enacted GATT legislation, and on our own motion, we are also proposing additional changes to our pioneer's preference rules.

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[53] *See Second Report and Order, supra* note 20, at ¶ ¶ 193, 253.

[54] *See id.*, at ¶ ¶ 233-240; *see also, e.g., Fifth Report and Order*, PP Docket No. 93-253, FCC 94-178 at ¶ ¶ 135-141 (released July 15, 1994), *on recon.*, 10 FCC Rcd 403 (1995), at ¶ ¶ 101-104.

[55] 47 U.S.C. § 309(j)(13)(C).

[56] Because a new allocation of spectrum requires a change in our rules, adoption of this proposal would also mean that pioneer's preferences would no longer be granted for new technologies or services that could be implemented without a rule change.

[57] We also note that in many existing services there are no licenses available in major metropolitan areas, and so it would not be possible to award a pioneer's preference in those areas.

VI. PROCEDURAL INFORMATION

A. *Regulatory Flexibility Act -- Second R&O*

54. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact on small entities of the rules adopted in this document. The FRFA is set forth in Appendix B. The Secretary shall send a copy of this *Second Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1988).

B. *Ordering Clauses -- Second R&O*

55. Accordingly, IT IS ORDERED that Parts 1 and 5 of the Commission's Rules ARE AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), and 309(j). IT IS FURTHER ORDERED that Ameritech's Motion To Accept Late Filed Comments IS GRANTED.

C. *Initial Regulatory Flexibility Analysis -- Further Notice*

56. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action

This action is being initiated to in response to directives contained in the GATT legislation and on our own motion.

B. Objective

The objective of this proposal is to implement the GATT legislation's modifications to the Communications Act and to make additional changes to the pioneer's preference rules to increase their efficiency.

C. Legal Basis

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j)(13) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 303(c), 303(f), 303(g), 303(r), and 309(j)(13).

D. Description, Potential Impact, and Number of Small Entities Affected

The payment requirement imposed by the GATT legislation may impact small businesses that obtain pioneer's preference licenses. However, we have proposed to allow small businesses, pursuant with the GATT legislation, to pay for their licenses in installments over a period not to exceed five years.

E. Reporting, Record Keeping and other Compliance Requirements

None.

F. Federal Rules which overlap, Duplicate or Conflict with this Rule.

None.

G. Significant Alternatives

We invite comment on any alternative proposals.

D. *General -- Further Notice*

57. The rule making proposals in the *Further Notice* constitute a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

58. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **March 29, 1995**, and reply comments on or before **April 12, 1995**. All relevant and timely comment will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

59. For further information concerning this rule making, contact Rodney Small at (202) 776-1622, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A -- Final Rules

I. Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.402 is amended to read as follows:

Section 1.402 Pioneer's Preference.

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(c) Pioneer's preference requests relating to a specific new spectrum-based service or technology will not be accepted after the Commission's Sunshine Notice is issued announcing initiation, by either a notice of inquiry or notice of proposed rule making that will be considered by the Commission at a public meeting, of a proceeding pertaining to that service or technology. Alternatively, if the Commission initiates a new proceeding pertaining to a specific new spectrum-based service or technology by notation, pioneer's preference requests will not be accepted after such notice is submitted to the Commission for vote.

(d) Pioneer's preference requests complying with the requirements and procedures in paragraphs (a) through (c) of this section will be accepted for filing and listed by file number in a notice of proposed rule making addressing the new service or technology proposed in the request, if such a notice of proposed rulemaking is adopted. A final determination on a request for pioneer's preference and its scope will normally be made in a report and order adopting new rules for the service or technology proposed in the request, if such rules are adopted. If awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications. If granted, the construction permit or license will be subject to the conditions in paragraphs (f) and (g) of this section.

(e) Any interested person may file a statement in support of or in opposition to a request for pioneer's preference listed in a notice of proposed rule making, and a reply to such statements, subject to filing deadlines that shall be published in the notice of proposed rule making. Statements on the merits of pioneer's preference requests must be filed separate from, and not part of, any comments on the rules proposed in the notice of proposed rule making. Statements on pioneer's preference requests will not be accepted prior to issuance of the notice of proposed rule making.

(f) As a condition of its license grant, a pioneer's preference grantee will be required to construct a system that substantially uses the design and technologies upon which its pioneer's preference award is based within a reasonable time, as determined by the Commission, after receiving its license. Failure to comply with this provision will result in revocation of the pioneer grantee's license, and transfer of the license will be prohibited until this requirement is met.

(g) In services in which licenses are assigned by competitive bidding, any parties receiving pioneer's preferences will be required to pay for their licenses in accord with the payment formula specified in the General Agreement on Tariffs and Trade legislation, Pub. L. No. 103-465. This formula requires that pioneers pay in a lump sum or in installment payments over a period of not more than five years 85 percent of the average price paid for comparable licenses. Comparable licenses will be determined by the Commission on a case-by-case basis.

(h) In the event of a conflict between this rule and any rule for a particular service that provides for the filing and consideration of competing applications, this rule shall prevail.

3. Section 1.403 is amended to read as follows:

Section 1.403 Notice and availability.

All petitions for rule making (other than petitions to amend the FM, Television, and Air-Ground Tables of Assignments) meeting the requirements of § 1.401 will be given a file number and, promptly thereafter, a "Public Notice" will be issued (by means of a Commission release entitled "Petitions for Rule Making Filed") as to the petition, file number, nature of the proposal, and date of filing. Petitions for rule making are available at the Commission's Dockets Reference Center (1919 M Street N.W., Room 239, Washington, DC).

II. Part 5 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 5 -- EXPERIMENTAL RADIO SERVICES (OTHER THAN BROADCAST)

1. The authority citation for Part 5 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply sec. 301, 48 Stat. 1081, as amended; 47 U.S.C. 301.

2. Section 5.207 is amended to read as follows:

Section 5.207 Experiments performed in conjunction with pioneer's preference applications.

An applicant for a pioneer's preference pursuant to § 1.402 may file an experimental license application for a limited geographical area, generally including no more than one Metropolitan Statistical Area. In order to be eligible for a preference at the time of a report and order in a proceeding addressing a new service or technology, the experimental applicant must demonstrate the technical feasibility of its proposal by summarizing its experimental results in its preference application, unless it instead submits an acceptable showing of technical feasibility. If a pioneer's preference applicant wishes the Commission to consider in conjunction with the application experimental material filed subsequent to the application, the applicant must summarize this material and submit the summary to the Commission prior to the Sunshine Notice announcing that a report and order pertaining to the new service or technology will be considered by the Commission at a public meeting, or -- if a report and order is considered by notation -- prior to submission of the report and order to the Commission for vote. All experimental material must be summarized and its relevance to the pioneer's preference application explained in order for it to be considered by the Commission.

Appendix B -- Final Regulatory Flexibility Analysis -- *Second R&O*

Pursuant to 5 U.S.C. Section 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in this proceeding. Written comments on the proposals in the *Notice*, including the IRFA, were requested.

A. Need for and Objective of Rules:

Our objective is to modify the pioneer's preference rules to make them better comport with newly-enacted competitive bidding authority and our experience administering them.

B. Issues Raised by the Public in Response to the IRFA:

No party specifically responded to the IRFA.

C. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent With Stated Objectives:

We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary to ensure that the public receives the benefit of expeditious provision of new services and technologies. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities.

Before the
Federal Communications Commission
Washington, D.C. 20554

IB Docket No. 95-22

In the Matter of

Market Entry and Regulation of	RM-8355
Foreign-Affiliated Entities	RM-8392

ORDER

Adopted: March 15, 1995; Released: March 15, 1995

By the Chief, International Bureau:

1. Telefonica Larga Distancia de Puerto Rico, Inc. (TLD) requests that the time for filing Comments and Reply Comments to the *Notice of Proposed Rulemaking* [1] be extended four weeks. TRW Inc., IDB Mobile Communications, Inc., and AmericaTel Corporation join TLD in this request.

2. This proceeding seeks comments on a broad range of complex legal, economic and policy issues involving the entry and regulation of foreign-affiliated entities in the U.S. telecommunications market. The issues raised have been the subject of much debate in recent years, and the Commission is interested in receiving a complete and balanced presentation on the numerous issues. While the Commission recognizes the wide range of issues to be addressed, it is also interested in completing this proceeding in a timely manner. Therefore, the Commission will limit the requested extension of time for Comments and Reply Comments to two weeks from the original due dates of March 28, 1995, and April 28, 1995, respectively.

3. Although the Bureau does not routinely grant extension requests, we find that an extension of the deadline for Comments to April 11, 1995, would be beneficial in this proceeding as it would enable the parties to fully develop their positions on the many issues raised in this proceeding. In addition, the Bureau will extend the deadline for filing Reply Comments to May 12, 1995. The parties should note, however, that the Bureau remains committed to completing this proceeding in a timely manner and that no further extensions are contemplated.

4. Accordingly, pursuant to Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, IT IS ORDERED THAT the deadline for filing Comments to the *Notice of Proposed Rulemaking* IS EXTENDED to April 11, 1995, and the deadline for filing Reply Comments IS EXTENDED to May 12, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[1] *Notice of Proposed Rulemaking*, IB Docket No. 95-22, RM-8355, RM-8392 (Released February 17, 1995)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-221

In the Matter of

Review of the Commission's
Regulations Governing Television
Broadcasting

REPORT AND ORDER

Adopted: March 7, 1995; Released: March 7, 1995

By the Commission:

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I. INTRODUCTION

1. By this *Report and Order,* the Commission eliminates two of its network rules, 47 CFR Section 73.658(f) and 47 CFR Section 73.658(l). Section 73.658(f), the "network station ownership" rule, prohibits network ownership of television broadcast stations in markets that have so few stations, or stations of such unequal desirability (in terms of coverage, power, frequency, or other related matters), that "competition would be substantially restrained" by permitting network ownership.[2] Section 73.658(l), the "secondary affiliation" rule, limits secondary affiliations in markets where two stations have affiliated with two of the three "traditional" networks, and there is at least one independent station with comparable facilities.[3] In these circumstances, Section 73.658(l) requires a third network seeking an affiliate in the market to offer its programming first to the independent station. The Commission concludes that changes in the marketplace have made both rules obsolete.

II. BACKGROUND

2. The genesis for this proceeding was a 1991 report by FCC Office of Plans and Policy (OPP report) on broadcast television and the evolving market for video programming.[4] The OPP report concluded that the video market had undergone enormous changes since 1975. Among the changes were increasing competition in the video marketplace and rapid growth in the availability of national sources of programming resulting in a plethora of new services and choices for video consumers. In addition, the OPP report suggested that these competitive forces were affecting the ability of over-the-air-television to contribute to a diverse and competitive video programming marketplace.

3. The OPP report prompted the Commission to release a *Notice of Inquiry* (*NOI*)[5] in 1991 to seek comment on the implications of the growth of competition in the video marketplace for our regulatory policies. As part of this inquiry, we asked which Commission regulations, if any, hamper the ability of the networks, their affiliates, or independents to compete with multichannel delivery systems. After reviewing the comments filed in response to the *NOI*,[6] we adopted a *Notice of Proposed Rulemaking* (*NPRM*)[7] in 1992 to consider changes to several long-standing structural rules that have governed the television industry. The *NPRM* proposed alternative means of lessening the regulatory burden on the television broadcasting industry as it seeks to adapt to the multichannel video marketplace. The *NPRM* specifically proposed repeal of the dual network rule (Section 73.658(g)), the network station ownership rule, and the secondary affiliation rule. After reviewing the comments filed in response to the *NPRM*,[8]

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[2] The rule states that "[n]o license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control of a network organization for a television broadcast station in any locality where the existing television broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. (The word 'control' as used in this section, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.)" 47 CFR Section 73.658(f).

[3] The rule begins by stating that "[t]he provisions of this paragraph govern and limit the extent to which, after October 1, 1971, commercial television stations in the 50 States of the United States, which are regular affiliates of one of the three national television networks, may broadcast programs of another network, in markets where there are two such affiliated stations and one or more operational VHF or UHF stations having reasonably comparable facilities which are not regular affiliates of any network." 47 CFR Section 73.658(l). The rule continues for 20 additional paragraphs and two notes defining and explaining the precise circumstances under which a network may not obtain a secondary affiliation in a television market (*e.g.*, the rule defines station, network, television market, comparable facilities, types of programming, and offer and acceptance).

[4] F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace,* FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991).

[5] *Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991).

[6] Thirty-nine parties filed initial comments, and 19 filed reply comments.

[7] *Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992).

[8] Thirty-four parties filed initial comments, and 17 filed reply comments. A list of commenters is attached as Appendix B.

we have decided in this *Report and Order* to eliminate the network station ownership rule (Section 73.658(f)) and the secondary affiliation rule (73.658(l)).[9]

III. DISCUSSION

A. The Network Station Ownership Rule.

4. *Rule.* As explained above, the network station ownership rule prohibits a network organization from owning a TV broadcast station in any locality where the existing TV broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained. The definition of network for purposes of this rule derives from the Chain Broadcasting report[10] and applies to any broadcast television network that distributes programming to two or more interconnected facilities.

5. *History.* The network station ownership rule derives from a similar rule applicable to AM radio networks, which originally was promulgated as part of the 1941 Chain Broadcasting rules. While recognizing that the ownership of broadcast stations by networks may result in a more efficient network broadcast system,[11] the Chain Broadcasting report expressed concern over the potential for network ownership of radio stations to reduce competition among networks for affiliates and impede the growth of new networks. The rule sought to increase the availability of programming to viewers, prevent domination of smaller markets by networks, and encourage the creation and growth of new networks by preventing existing networks from "bottling up" the best facilities.[12] A parallel rule was applied to television in 1946.[13] When the rule was applied to television in 1946, there were only six television stations in the United States. In 1977, the application of Section 73.658(f), together with most of the other Chain Broadcasting rules, was eliminated for AM and FM radio stations.[14] The Commission cited "tremendously changed circumstances [in the radio industry]" as the reason for the elimination of the rule. The Commission noted the great increase in the numbers of radio stations and networks and the decreased economic importance of networks and concluded that "the abuses and practices dealt with [in the Chain Broadcasting rules] are unlikely to develop [in the current radio industry] to any substantial extent.[15]

6. *Comments.* All commenters addressing our proposal to eliminate this rule supported our proposal. Several commenters argue that the growth in broadcast and non-broadcast outlets in markets of all sizes has rendered the rule obsolete. They agree with our statement in the *NPRM* that the average television market has approximately seven licensed commercial television stations (in contrast to the six on-air television stations in the entire country at the time of the rule's adoption), and over half of all households receive more than ten over-the-air stations.[16] ABC points out that sufficient channels have been available so that the Fox Broadcasting Company was able to establish a national network, that other regional, occasional and special interest broadcast networks have developed and that there is little, if any, danger of network domination of communications outlets in small markets.[17] Furthermore, commenters note, cable television and home satellite dishes help make network programming available even in the smallest of markets.[18]

7. NBC argues that the network station ownership rule is unnecessary because networks have typically sought to own television stations in larger markets.[19] NBC also argues that the failure of the network station ownership rule to have ever been successfully invoked to deny network acquisition of any television stations is a testament to its obsolescence.[20] Moreover, commenters assert that, although raised infrequently (only six times since 1946), the rule might be contrary to the public interest because it could deter network companies from investing in smaller market stations.[21] Such stations, they indicate, lost on the average $880,000 each in 1991.[22] Network ownership of small market stations could, they continue, preserve such stations and provide viewers with better service in such markets because of the economic resources the networks represent.[23] NTIA maintains that network ownership of stations in small markets might also permit improvements in program quality, including locally-produced news and information programming.[24] Yet, to the extent the rule is intended to preserve a competitive balance in small markets, commenterscontend it discriminates against the networks because it does not place any similar limitation on other group owners or well-financed non-network owners whose acquisitions of small market stations could have similar competitive effects.[25]

8. *Decision.* The network station ownership rule has rarely been invoked. It has only been raised in a total of six cases and has never prevented a network purchase of a television station.[26] Moreover, the television market has undergone enormous change. Chief among these changes has been the growth in the number of television broadcast stations since adoption of this rule. When the Section

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[9] The Commission will address the dual network rule in a later document.

[10] *Report on Chain Broadcasting,* Federal Communications Commission, Commission Order No. 37, Docket No. 5060 at 92 (May 1941).

[11] *Id.* at 67-68.

[12] *Id.* at 67-69.

[13] The rule was applied as part of a general Rule Making *Order* which established the first television table of allotments and transposed relevant regulations governing standard and FM radio broadcasting stations to the new medium. 47 CFR §§3.631-3.638 (1946); *Amendment of Part 3 of the Commission's Rules,* 11 Fed. Reg. (January 1, 1946).

[14] *Report, Statement of Policy, and Order* in Docket No. 20721, 63 FCC 2d 674 (1977).

[15] *Report, Statement of Policy, and Order* in Docket No. 20721, 63 FCC 2d 674, 678 (1977).

[16] *See, e.g.,* Capital Cities/ABC, Inc. (ABC) Comments at 27-28; National Association of Broadcasters (NAB) Comments at 36-37; National Telecommunications and Information Administration (NTIA) Comments at 31-32.

[17] ABC Comments at 27 and 29.

[18] *See, e.g.,* NAB Comments at 36-37; National Broadcasting Company, Inc. (NBC) Comments at 36.

[19] NBC Comments at 36.

[20] NBC Comments at 35-36.

[21] *See* ABC Comments at 30; NTIA Comments at 33-34. The commenters did not provide a definition of "smaller market stations."

[22] *See* NAB Comments at 37; NTIA Comments at 33.

[23] NBC Comments at 36.

[24] NTIA Comments at 33-34.

[25] NAB Comments at 37.

[26] *See General Times Television Corp.,* 13 RR 499 (1956) (with-

73.658(f) was applied to television in 1946 there were six television stations in the United States. As of December 1994, there were 1,523 full-power commercial and noncommercial television stations (682 VHF and 841 UHF). As a result of these changes, it is unlikely that the potential problems that led to adoption of the rule could occur. The rule only applies when there are "so few" television stations or where they are of such "unequal desirability" that competition would be substantially restrained. Such conditions are rare today. There are currently 13 markets that have only one commercial television station and there are 25 markets that have only two commercial stations. The 38 markets represent 2.7% of all television households. If we include both commercial and noncommercial stations, there are five markets with one television station and 21 markets with two television stations.

9. Since there are now so few small television markets of the type affected by the rule, it is not likely that network ownership of a station in these small markets can effectively be used to block the emergence of competing new networks. Fox, for example, has developed successfully without reaching 100 percent of television households. In addition, United Paramount Network (UPN) and Warner Brothers TV Network (WB) have entered the market and received advertiser support with less than full coverage of the United States. Both UPN and WB networks now reach approximately 80 percent of U.S. television households.[27] These examples suggest that the 2.7 percent of television households represented by the 38 markets affected by the rule are not likely to be critical to the development of new networks. Moreover, networks are not as dependent on broadcast markets for coverage as was the case before the advent of cable. For example, Fox has filled in gaps in its reach through cable affiliations, and 18 percent of WB's coverage is attributable to cable carriage of WGN (Chicago) in markets without WB affiliates.[28]

10. We also believe that elimination of our rule prohibiting network ownership of a station in a small market is unlikely to have an adverse effect on the availability of video programming to the public. When the Commission first adopted the rule in 1946, it intended to preserve a television station's access to alternative program sources. In this way, viewers in those markets would be able to see programs from more than just one network. An affiliate could choose to air another network's programming while an owned and operated station of a network could not. Today, small television markets still have only one or two broadcast outlets but network programming not available by over-the-air television in these small markets can be made available by cable and/or satellite home dish importation of distant network signals. The average cable penetration in the 38 markets with one and two broadcast stations is 68 percent (cable penetration in these markets ranges from 50 percent to 89 percent).[29] While cable and DBS are subscription services and are, therefore, not a complete substitute for broadcast television, their existence exerts competitive pressure on the television station(s) to show the best available programs. Moreover, we will continue to scrutinize potential adverse effects on competition and other public interest implications of network ownership of a station in a small market during the license transfer process.

11. Accordingly, we conclude that the network station ownership rule is no longer necessary to increase the availability of video programming to viewers or further the creation of new networks, and thus we find no basis to retain this rule. In addition, it is possible that the rule may well preclude potential benefits to the public. We note that the commenters agreed, without refutation by any party, that network ownership could produce efficiencies in managerial, technical, and other operations that would improve the financial viability and competitiveness of television broadcast stations in small markets, which could then better provide greater service to the public. Therefore, we are eliminating the network station ownership rule.

B. Secondary Affiliation Rule

12. *Rule.* The secondary affiliation rule specifically requires that in TV markets where two of the three traditional networks already have an affiliate, a network with no affiliate in the market must offer prime-time programs and weekend sports events to independent stations with facilities comparable to the other network affiliates (UHF or VHF) before offering the programs to either of the two affiliated stations. The term "network" in the rule is defined in two ways. A station is considered a network affiliate only if it has a regular affiliation with "one of the three national television networks" -- i.e., ABC, NBC, or CBS. 47 CFR Section 73.658(1)(1)(iii). However, networks whose programming is affected by the rule -- that is, the networks that are seeking an affiliation in a market that only has two "affiliates" within the meaning of the rule -- include any "national organization[s]" that distribute programs "for a substantial part of each broadcast day to television stations in all parts of the United States, generally via interconnection facilities." 47 CFR Section 73.658(1)(1)(v). At the present time, only ABC, CBS and NBC are covered by this definition because no other national networks as yet distribute programming "for a substantial part of each broadcast day." The rule as adopted is, in effect, a very narrowly drawn exception to the Commission's exclusive affiliation rule, which prohibits an affiliate from entering into any

out a written opinion, network purchase of one of Hartford's two commercial stations (a UHF station) approved); *New Britain Broadcasting Co.*, 21 FCC 958 (1956) (network purchase of New Britain's only television station (UHF) approved, with the Commission taking cognizance of two other stations in the Hartford market); *St. Louis Telecast, Inc.*, 22 FCC 625 (1956) (Section 73.658 deemed not to apply where there were three commercial and one noncommercial stations in the market (St. Louis)); *Hyman Rosenblum*, 22 FCC 1432 (1957) (acquisition permitted in market (Albany) with three stations, assuring station availability for all three networks); *Biscayne Television Corp.*, 22 FCC 1464 (1957) (acquisition permitted in market (Miami) with three stations and two additional allocations, assuring availability of three national networks' programs over approximately equal facilities); and *National Broadcasting Co., Inc.*, 44 FCC 2098 (1960) (renewal of network's license approved in city (Philadelphia) with three television stations). For a discussion of these cases, see L.A. Powe, Jr., "FCC Determinations on Networking Issues in Multiple Ownership Proceedings" at 51-59 (August 1979) in Network Inquiry Special Staff, *Preliminary Report on Prospects for Additional Networks* (Feb. 1980).

[27] *Broadcasting and Cable* (January 16, 1995) at 10; *Communications Daily* (December 23, 1994) at 5.

[28] *Broadcasting and Cable* (January 2, 1995) at 36.

[29] *Broadcasting and Cable Yearbook 1994* at D-68.

agreement with a network under which the station is prevented, hindered or penalized for broadcasting the programs of any other network. *See* Section 73.658(a) of the Commission's Rules.

13. *History*. The secondary affiliation rule was adopted by the Commission in 1971 in order to promote development of UHF television stations. The proceeding in which the rule was adopted was initiated by a petition that indicated that in certain markets with two VHF network affiliates and one UHF independent television station, the UHF stations had not been able to obtain regular affiliations with one of the three major networks. Instead, in such markets, the third national network, which had no affiliate in the market, frequently would place its programs on a secondary basis on one or both of the VHF stations, rather than offer them to the UHF independent. This practice created a self-perpetuating predicament: because UHF stations allegedly could not deliver the audience, a network with no affiliate in the market would first offer its programs to VHF stations affiliated with another network rather than to an independent UHF station. Because independent UHF stations had only tenuous secondary access to the popular program fare, they could not develop the audience necessary to interest the networks or to generate the income necessary to improve their facilities. This self-perpetuating situation was thwarting the development of the UHF television service and was therefore contrary to the expressed Commission goal of fostering the development of UHF television stations as "viable, truly competitive outlets capable of contributing to the full development of television in the United States."[30]

14. Accordingly, the Commission adopted the secondary affiliation rule. Even at the time of adoption, the Commission indicated that the rule applied to only "a very limited number of situations" and expressed the hope that the need for it would expire as a result of "voluntary affiliation by the network with the UHF station."[31] "Thus benefitted, it is hoped that they [UHF stations] will become viable operations, making a permanent contribution to the full development of the nation's television system."[32]

15. *Comments*. Commenters were divided with respect to the continued merit of and need for the secondary affiliation rule. Commenters favoring repeal of the rule contend that in 1971, when the rule was adopted, the Commission was concerned that networks would "bypass" unaffiliated UHF stations in favor of stronger VHF facilities, stunting the growth of UHF television.[33] However, these commenters note that there has been a large increase in UHF commercial and non-commercial stations on-the-air (from 292 in 1971 to 817 at the time the comments were filed), and they assert that both the all-channel capability of television receivers and the prevalence of cable carriage has reduced any UHF disadvantages and eliminated the need to protect and foster UHF development by this rule.[34] Commenters also point to "a multitude" of program sources from which independent stations may obtain programming -- including new sources for first-run syndicated programming -- which, they claim, further reduces the need for such a rule from that present in 1971 when there were only about 90 independent stations and the syndicated program supply market was weak.[35] Moreover, NBC further argues that, at present, networks generally prefer a full-time affiliation with a UHF station to part-time carriage by a VHF station.[36]

16. Further, commenters favoring repeal argue that, in practice, the rule restricts only the three traditional networks by limiting the stations with which they can affiliate and allows other program distributors flexibility to choose their program outlets. These commenters do not believe that this is rational in the competitive video marketplace that the networks face today. Networks should, commenters favoring repeal continue, be free to choose their affiliates and distribute their programs in the method best serving their competitive interests. To retain the rule, these commenters conclude, would provide unaffiliated stations with a government subsidy that cannot be justified under existing market conditions.[37] Furthermore, Capitol asserts that the dominance of the three networks has been weakened as the number of media outlets has grown and the strength of independent stations has increased.[38] Thus, it concludes, a great number of stations have been constructed without any expectation of a network affiliation, demonstrating that their owners do not believe one is needed to survive. This, it continues, has led to a diminished bargaining power of the networks and a substantial alteration in the relationships between networks and their affiliates further rendering this rule unjustified and unnecessary.[39]

17. Other commenters, including network affiliate groups, broadcast trade organizations and some broadcasters, urge retention of the rule. They maintain that circumstances have not changed to the degree necessary to justify changing the rule. ABC Television Affiliates argues that "the public interest considerations in assuring the availability in each market of full three-network service" warrant retention of the rule.[40] NAB asserts that, although there has been a considerable increase in the supply of programming since the rule's adoption, there has also been a large increase in the number of video outlets -- both broadcast and nonbroadcast -- all of which compete for programming. As a result, it argues, more than one half of all independent stations lost at least $300,000 each in 1991, and UHF independent station profits dropped to an average loss of $567,000, making elimination of the rule and the protections it affords "inadvisable."[41] NAB also points to the intense debate over the Commission's financial interest and syndication rules as evidence of the commercial value that continues to be ascribed to network programming and the importance that independent stations place on access to such programming. Other commenters believe that, without the rule, weaker independent stations are

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[30] *First Report and Order* in Docket No. 18927, 28 FCC 2d 169, 185 (1971), *recon. denied*, 22 RR 2d 1732 (1971).

[31] *Id.* at 185.

[32] *Id.* at 191.

[33] ABC Comments at 31.

[34] *See, e.g.*, ABC Comments at 32; Capitol Broadcasting Co., Inc. (Capitol) Comments at 13-14; NBC Comments at 39.

[35] NBC Comments at 38-39; ABC Comments at 32.

[36] NBC Comments at 39.

[37] *See* ABC Comments at 33-34. ABC apparently believes that by "channeling" network programming to independent stations the Commission is subsidizing them, obtaining for independent stations a benefit that they may not be able to secure absent the rule.

[38] Capitol Comments at 14.

[39] *Id.* at 11 and 14.

[40] ABC Television Affiliates Association Reply Comments at 5.

[41] Although in its comments, NAB attributes these statistics to *TV Digest*, they are also reported in the *1993 NAB Television Financial Report*, 1991 Data, pp. 181, 219.

placed at an "extreme" competitive disadvantage; these commenters assert that without the rule the twice-affiliated station could "cherry-pick" its preferred network programming and prevent the public from seeing the network programs it chose not to air.[42]

18. *Decision.* We need not decide in this proceeding the broader issue of whether UHF independent stations remain at a disadvantage for any purpose as compared to VHF stations. Nor need we decide whether network power has been diminished to such an extent that elimination of every existing restraint on network activities is warranted. The record developed herein persuades us that the secondary affiliation rule is unnecessary to ensure the availability of competitive programming to unaffiliated stations. Two factors lead us to this result: 1) improvements to UHF reception; and 2) the increased availability of programming and heightened competition for affiliates.

19. As stated above, the secondary affiliation rule sought to break the self-perpetuating cycle that made independent (primarily UHF) stations an unattractive delivery vehicle for the networks. While the rule was limited by its terms to providing a regulatory boost to independent stations that had "reasonably comparable facilities" vis-a-vis their affiliated counterparts, these independent stations nevertheless operated at a technologically-based disadvantage even though the facilities might be comparable. For example, in 1971, many television receivers could not receive UHF signals, and those that could did not provide equivalent tuning of UHF and VHF stations.

20. From a technical perspective, the ability of the UHF television service to compete against VHF service, however, has improved in the 24 years since the secondary affiliation rule was adopted. One major change occurred as a result of the Commission's invocation -- beginning in the 1970s -- of the authority it had been given under the All-Channel Receiver Act of 1962 to require not only that television receivers be capable of receiving UHF as well as VHF channels, but that such receivers provide a greater degree of tuning comparability for VHF and UHF channels.[43] Pursuant to this authority, between 1970 and 1973, the Commission required television receivers to have more comparable tuning for UHF channels.[44] In 1976, the Commission provided that any television receiver equipped with a VHF antenna must also have a UHF antenna,[45] and in 1978 the Commission reduced the maximum allowable noise figure for television receivers.[46] In 1982, the Commission modified the television all-channel requirements and recommended that information on improving UHF reception be disseminated to the public.[47] Advances in television design and the role of cable carriage have decreased the gap between VHF and UHF stations. These developments substantially alleviated the technical disadvantages faced by UHF television receivers, and thus removed one of the obstacles to the development of UHF service for which the secondary affiliation rule was designed to compensate.

21. The second development that has minimized the need for the secondary affiliation rule is the significant increase of sources of programming since 1971 when the rule was adopted. In markets where the rule would apply today, we believe that independent stations, either UHF or VHF, should remain viable entities by looking to these alternative program sources -- including Fox, United Paramount and Warner Brothers -- even if they lose the benefit of a regulatory "right of first refusal" on some programming of the three traditional networks.[48] In addition, independent stations have access to a plethora of syndicated first-run and off-network programming.

22. An overview of the marketplace reveals that independent UHF stations have become more competitive despite their lack of affiliation with the traditional networks, and that they no longer appear to need regulatory assistance to attract affiliations of nascent networks. Thus, of Fox's 140 primary affiliates, 121 (86%) are UHF stations;[49] of United Paramount's 95 affiliates, 78 (82%) are UHF stations;[50] and of Warner Brothers 43 affiliates, 34 (79%) are UHF stations.[51] This was not a result of the "secondary affiliation" rule because none of the programmers involved, Fox, United Paramount and Warner Brothers, "distribut[e] programs for a substantial part of *each* broadcast day," so as to qualify as "networks" under the definition contained in Section 73.658(l)(l)(v) of the Commission's Rules. (Emphasis added.) Rather, these nascent networks chose UHF stations as their primary affiliates rather than opting for secondary affiliations with VHF stations.

23. To illustrate some of the factors influencing the viability of UHF stations, we note that in 1971, there were 179 commercial UHF television stations on the air.[52] As of December 31, 1994, the number of commercial UHF stations had risen to 601, an increase of 235 percent.[53] We also note that, contrary to the one-year financial snapshot offered by NAB for 1991, profits for UHF independents, on average, have risen dramatically since that year. In 1992, average profits were $552,000, and in 1993, average profits tripled to $1.5 million.[54] Indeed, recognizing that the UHF service has achieved some degree of comparability with the VHF service, the Commission eliminated the UHF Impact Policy in 1987.[55] This degree of comparability may not be high enough to warrant the rescission of all rules designed to promote UHF stations. Indeed, we have asked for comment on the issue of 6VHF/UHF comparabil-

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[42] Fisher Broadcasting, Inc. Comments at 9.

[43] Pub. L. 87-529 (July 10, 1962) 76 Stat. 150, *codified at* 47 U.S.C. §303(s), 330; *First Report and Order* in Docket No. 14769.

[44] *Report and Order* in Docket No. 18433, 21 FCC 2d 245 (1970); *Memorandum Opinion and Order* in Docket No. 18433, 23 FCC 2d 793 (1970); *Report and Order* in Docket No. 19268, 32 FCC 2d 612 (1970); *Report and Order* in Docket No. 19722, 43 FCC 2d 395 (1973).

[45] *Report and Order* in Docket No. 20839, 62 FCC 2d 164 (1976).

[46] *Report and Order* in Docket No. 21010, 69 FCC 2d 1866 (1978), *recon. denied,* 70 FCC 2d 1176 (1978). "Noise" is a measure of the effectiveness of television receivers in displaying a weak television signal.

[47] *Report and Order* in General Docket No. 78-391, 90 FCC 2d 1121 (1982).

[48] *Notice of Proposed Rule Making* in MM Docket No. 94-123, 9 FCC Rcd 6328, 6355 (1994).

[49] *Broadcasting & Cable Yearbook 1994,* at G-65.

[50] *Broadcasting and Cable* (January 2, 1995) at 36.

[51] *Id.*

[52] *Cable and Television Factbook, Cable and Services Volume,* 1985 Edition/No. 53 at 17.

[53] FCC News Release 51785 (January 24, 1995).

[54] National Association of Broadcasters, *1993 Television Financial Report* at 102; *1994 Television Financial Report* at 173.

[55] *Report and Order* in MM Docket No. 87-68, 3 FCC Rcd 638, (1987).

ity in other, currently open, proceedings.[56] Nevertheless, we do not believe that they continue to require the regulatory assistance of this narrowly drawn rule.

24. The basic goal underlying the Commission's adoption of the secondary affiliation rule was to increase the likelihood that UHF television would develop into a viable and competitive service. It appears that the rule has influenced this objective to the extent to which it was capable of doing so. In light of the changes in the market noted above, we believe this narrowly drawn rule is not needed.

25. We also believe that the practice of forcing the networks to make certain offers (*i.e.*, for primary affiliation with an independent station in lieu of a secondary affiliation with an existing network affiliate) may have negative consequences in markets where the rule is applicable by denying affiliated stations maximum programming choices. Such stations are precluded from competing for such secondary network affiliation. As a consequence, they are barred from access to such network programming irrespective of their independent business judgment as to the desirability of that programming. This interference with commerce and free choice should not be maintained where, as here, there remains little justification. Accordingly, it appears that whatever benefits this rule has brought will now continue without this type of regulatory assistance. In light of the foregoing, we are eliminating the secondary affiliation rule.

IV. CONCLUSION

26. Based upon our review of the record in this proceeding, we conclude that neither the "network station ownership" nor the "secondary affiliation" rules are required any longer. While independent stations and, particularly, UHF independents may no longer need the protections these specific rules provide, we reiterate that each of our network related rules must stand or fall on its own merit in light of the protection it was designed to afford, the costs it imposes and benefits in which it results, and the harm that its elimination would cause. We find that in the instant matter, these particular rules are no longer required by the public interest and we are deleting them.

Final Regulatory Flexibility Analysis

I. Need and Purpose of this Action: The Commission believes that this action will eliminate rules no longer required by the public interest in view of changes in the video marketplace since their adoption. Additionally, their elimination will make over-the-air television better able to compete in the current, and future, video environment.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

III. Significant Alternatives Considered and Rejected: The only alternative to the action being taken herein that was considered by the Commission was retention of the subject rules.

27. IT IS THEREFORE ORDERED that, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303(r), Part 73 of the Commission's Rules, 47 C.F.R. Part 73, IS AMENDED as set forth in the attached Appendix A.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Rule Changes

Part 73 of Title 47 of the U.S. Code of Federal regulations is amended to read as follows:

Part 73 RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334

2. Section 73.658 is amended by removing and reserving paragraphs (f) and (l).

APPENDIX B: LIST OF COMMENTING PARTIES

Comments

1. Abry Communications
2. Act III Broadcasting, Inc.
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Barnstable Broadcasting, Inc.
6. Buck Owens Production Company, Inc.
7. Capital Cities/ABC, Inc.
8. Capitol Broadcasting Company, Inc.
9. CBS Inc.
10. Clear Channel Communications
11. Commonwealth Communications Services, Inc.
12. Fisher Broadcasting Inc.

[56] *See, e.g., Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making* in MM Docket No. 91-221, FCC 94-322 (released Jan. 17, 1995) at ¶102; and *Review of the Prime Time Access Rule, Notice of Proposed Rule Making* in MM Docket No. 94-123, 9 FCC Rcd 6328 (1994).

13. Fox Inc.
14. Home Shopping Network, Inc.
15. Jet Broadcasting Co., Inc.
16. KFVE Joint Venture
17. LIN Broadcasting Corporation, Midwest Television, Inc., Paducah Newspapers, Inc., Post-Newsweek Stations, Inc., Providence Journal Company, and The Spartan Radiocasting Company
18. Malrite Communications Group, Inc.
19. Marion TV, Inc.
20. McKinnon Broadcasting Company
21. Morgan Murphy Stations
22. National Association of Broadcasters
23. National Broadcasting Company, Inc.
24. National Telecommunications and Information Administration
25. Network Affiliated Stations Alliance
26. Office of Communication of the United Church of Christ
27. Press Broadcasting Company, Inc.
28. Sinclair Broadcast Group, Inc.
29. Trinity Broadcasting Network
30. United States Catholic Conference
31. Vetter Communications Company, Inc.
32. Westinghouse Broadcasting Company, Inc.
33. WKRG-TV, Inc. and WEVV, Inc.
34. WNAL-TV, Inc.

Reply Comments

1. ABC Television Affiliates Association
2. American Federation of Television and Radio Artists
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Blackburn & Company, Inc.
6. Federal Trade Commission, Staff of the Bureau of Economics
7. Jet Broadcasting Co., Inc.
8. KMTR, Inc.
9. Morgan Murphy Stations
10. National Association of Black Owned Broadcasters
11. National Association of Broadcasters
12. National Broadcasting Company, Inc.
13. Office of Communications of the United Church of Christ
14. Paramount Stations Group, Inc.
15. Telecommunications Research and Action Center/Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights
16. WJAC, Inc.
17. WKRG, Inc. and WEVV, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 94-32

In the Matter of

Allocation of Spectrum Below
5 GHz Transferred from
Federal Government Use

ORDER

Adopted: March 16, 1995; Released: March 17, 1995

By the Chief, Policy Division, Wireless Telecommunications Bureau:

1. The First Report and Order and Second Notice of Proposed Rule Making (*Report and Notice)* in the above entitled proceeding, FCC 95-47, was adopted by the Commission on February 7, 1995, and released on February 17, 1995. A summary of the *Report and Notice* was published in the Federal Register on March 10, 1995. Comments in this proceeding are due March 20, 1995. Reply comments are due April 4, 1995.

2. On March 10, 1995, the Association for Maximum Service Television, Inc. (MSTV) filed a Motion for Extension of Time for the filing of comments and reply comments with the Commission until May 19, 1995, and June 5, 1995, respectively. MSTV states that an extension of the comment dates would allow time for the coordination within the broadcast industry to formulate and present a unified approach to spectrum allocation issues that are crucial to the future health of broadcasting. MSTV further states that the grant of additional time would not delay the assignment of the spectrum at issue since MSTV and other broadcasting organizations are preparing to file a petition for reconsideration of the *Report and Notice* that will question the legality of the Commission's central approach in allocating spectrum in the 4 GHz band. It states that while it is prepared to file comments before the Commission actually rules on its petition for reconsideration, there appears to be no reason to file comments well in advance of the Commission's consideration of that forthcoming petition for reconsideration and even several weeks before that petition become due.

3. The Commission has a statutory deadline of August 9, 1995, to adopt regulations for licensing the first 50 megahertz of spectrum reallocated from the Federal Government. *See* Section 309(j)(10)(B)(iii) of the Communications Act, 47 U.S.C. § 309(j)(10)(B)(iii). While we commend MSTV's stated intention of developing a unified industry approach that would render such comments more useful to the Commission, we note that this proceeding began almost one year ago with the adoption of a Notice of Inquiry on April 20, 1994. We believe that there has been ample time for interested parties to formulate positions with respect to this allocation proceeding, and we find no merit to the suggestion that the comment period in this pending proceeding should be extended. Such an extension of time would greatly reduce the Commission's time to analyze comments and reply comments thoroughly before making its decisions in this proceeding in compliance with the statutory deadline.

4. With respect to MSTV's stated intention to file a petition for reconsideration questioning the legality of the Commission's adoption of a Fixed and Mobile non-Government allocation for the 4 GHz band , we are not persuaded that the MSTV's filing of a petition for reconsideration will necessitate any delay in this proceeding.

5. Accordingly, IT IS ORDERED, that the motion for extension of time filed by the Association for Maximum Service Television, Inc., is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Policy Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Interactive Video and Data Service
(IVDS) Licenses

Additional Requests by Lottery
Winners to Extend Construction Deadline

ORDER

Adopted: March 24, 1995; Released: March 24, 1995

By the Associate Chief, Wireless Telecommunications Bureau:

1. Eleven licensees in the Interactive Video and Data Service (IVDS)[1] have requested a waiver[2] of Section 95.833(a) of the Commission's Rules,[3] which requires, in part, that each IVDS system licensee make service available to at least 10 percent of the service area population or geographic service area within one year of the grant of the license.[4] In a previous Order adopted March 13, 1995, the Bureau waived this one-year build-out requirement for six licensees.[5] In this present Order, we extend that relief to the eleven additional licensees.

2. Each of the present petitioners are situated similarly to the previous six. As noted in the previous Order, until October 20, 1994, a court case was pending that challenged the lottery process used to award these licenses.[6] Further, three Applications for Review[7] currently before the Commission make similar challenges and might well, if denied, be appealed to the courts. As noted previously, these challenges have created, and continue to create, uncertainty concerning the subject licenses.

3. Pursuant to Section 1.3 of the Commission's Rules,[8] the Commission may waive a provision of its rules "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)). Here, the general rule was intended "to reduce the filing of speculative applications by entities that have no real intention of implementing [IVDS] systems and to avoid the potential for warehousing of IVDS spectrum."[9] On the facts before us, we find that the standard for waiver is met. We are aware of no evidence of speculation or warehousing, and we find it would be unreasonable to require the petitioners to meet the current build-out requirements, given the uncertainty that exists concerning their licenses.[10] Moreover, we find that waiving the one-year construction deadline will not result in delays in service to the public because these licensees will still be required to satisfy the three-year and five-year construction benchmarks. Moreover, we believe that providing licensees with additional flexibility in satisfying the construction benchmarks is desirable and consistent with our intent to allow for more flexible use of the spectrum.

4. Our decision makes moot the additional argument made by certain petitioners[11] that an alleged lack of IVDS equipment, or installation delays, prevents them from ordering, receiving, or installing equipment in time to meet the build-out requirement.[12]

5. Accordingly, IT IS ORDERED that the requests of the licensees[13] for waiver of Section 95.833(a) of the Commission's Rules, 47 C.F.R. § 95.833(a), ARE GRANTED to the extent that we waive the one-year construction requirement, while retaining the three-year and five-year requirements, for the eleven subject licenses. All other requests ARE DENIED. This action is taken pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, by delegated authority. IT IS FURTHER ORDERED that this action IS EFFECTIVE UPON RELEASE.

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[1] *See generally Report and Order* in GEN Docket No. 91-2, 7 FCC Rcd 1630 (1992).

[2] The licensees and filing dates of their requests are as follows: Brian Berson, call sign KIVD-0010, filed March 17, 1995; Ronald E. Dowdy, KIVD-0001, March 20 & 22, 1995; Alberto E. Garza, KIVD-0004, March 20, 1995; ITV, Inc., KIVD-0011, March 13, 1995; J&M Partnership, KIVD-0014, March 20, 1995; Raveesh K. Kumra, KIVD-0012, March 16, 1995; Legacy TV, Inc., KIVD-0015, March 15, 1995; Maritime Communications Corp., KIVD-0016, March 15 & 20, 1995; Ignacio Santos de Hoyos, KIVD-0009, March 15, 1995; Self Communications, Inc., KIVD-00006, March 13, 1995; and WHF, Inc., KIVD-0007, March 15, 1995.

[3] 47 C.F.R. § 95.833(a).

[4] The petitioners' licenses were awarded by lottery held September 15, 1993, and were granted on March 28, 1994.

[5] *Order*, DA 95-481, released March 13, 1995.

[6] Larry M. Warner, Esq., Trustee, John Calvin Kemmer Inter Vivos Trust v. FCC, No. 93-1668 (D.C. Cir.). The case was dismissed on October 20, 1994 .

[7] *See* Genesis Perpetual Trust, "Application for Review," filed October 18, 1993; Edward M. Johnson, "Application for Review," filed March 25, 1994; Jan M. Reed, "Application for Review," filed March 25, 1994. These filings request, *inter alia*, that the results of the lottery be invalidated. These entities have also filed additional, subsequent applications or petitions, challenging the March 28, 1994 issuance of licenses.

[8] 47 C.F.R. § 1.3.

[9] *Report and Order, supra* note 1, at 1640 ¶ 73; *see Memorandum Opinion and Order* in GEN Docket No. 91-2, 7 FCC Rcd 4923, 4925 ¶ 13 (1992).

[10] *See, e.g., In re Rainbow Broadcasting Co.*, FCC 94-122, 9 FCC Rcd 2839, 2846 ¶ 37 (1994); *see also Public Notice*, DA 92-1231, 57 Fed. Reg. 41935, 41936 (Sept. 14, 1992).

[11] *See* filings, *supra* note 2, with the exception of those filed by Raveesh K. Kumra and Ignacio Santos de Hoyos.

[12] We have previously stated that we do not intend to relieve IVDS licensees of the construction requirements on the basis that development or deployment of equipment has taken longer than might have been anticipated. *See Report and Order, supra* note 1, at 1639 ¶ 66; *Order, Answers to Questions from the June 6, 1994 Bidders Seminar of the Auction of Narrowband Personal Communications Services (PCS) Licenses and Interactive Video and Data Service Licenses*, Mimeo 43550, released June 17, 1994, at Question 5-2.

[13] *See* note 2, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Laurence Atlas
Associate Chief
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 27, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON TIA'S PETITION FOR RULEMAKING TO AMEND PART 68, SUBPART D RM-8621

Comments Due: May 1, 1995
Reply Comments Due: June 1, 1995

On March 9, 1995, the Telecommunications Industry Association (TIA), a national trade organization representing companies engaged in the manufacture, sale and distribution of telecommunications equipment, filed a petition for rulemaking to amend Subpart D of Part 68, 47 C.F.R. Sections 68.300-68.318, and portions of 47 CFR Section 68.2 to harmonize them with corresponding sections of Canada's CS-03 certification requirements. In its petition, TIA asserts that in the spirit of the North American Free Trade Agreement ("NAFTA"), its proposed amendments will promote barrier-free trade between Canada and the United States by the introduction of similar technical requirements for registration and certification of terminal equipment in both countries.

In September, 1990, TIA, through its TR-41.9 Engineering Committee involved in standards development for user premises equipment, sought to address differences between Canada's CS-03 certification requirements and Part 68. It established a joint working group co-chaired by Canada and the United States to examine the technical requirements for terminal attachment in each country with the aim of harmonizing them so that equipment in both countries could be designed to the harmonized requirements and tested one time to show compliance to them. TIA states that its proposed amendments to Part 68 reflect the results of the working group's effort.

Interested parties may file comments or reply comments concerning the petition. Comments should be filed by **May 1, 1995**, and reply comments should be filed by **June 1, 1995**. All filings should refer to RM-8621.

An original and four copies of all comments and replies should be filed with the Federal Communications Commission in accordance with Section 1.419(b) of the Commission's Rules, 47 C.F.R. Section 1.419(b). As required by that section, the distribution of the filings should be as follows: the original and one copy should be filed with the Secretary of the FCC, 1919 M Street, N.W., Washington, D.C. 20554; two copies should be filed with Marian Gordon, Common Carrier Bureau, FCC Room 6008, 2025 M Street, N.W., Washington, D.C. 20554; and one copy should be filed with the International Transcription Service (ITS), the Commission's contractor for public service records duplication, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 857-3800. The petition is available for review and photocopying at the FCC Reference Center, Rm 239, 1919 M Street, N.W., Washington, D.C., from 9:00-4:30, Monday through Friday.

This proceeding is non-restricted for purposes of the Commission's ex parte rules. *See generally* 47 C.F.R. Sections 1.1200-1.1216. For further information contact Bill von Alven (202/634-1833) or Marian Gordon (202/634-4215), Domestic Facilities Division of the Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 24, 1995

Request for Additional Comments on the Costs and Benefits of International Blocking for Residential Customers
CC Docket No. 91-35

Pleading Cycle Established

COMMENTS: April 24, 1995
REPLY COMMENTS: May 8, 1995

The Commission currently has under consideration in the above-referenced docket issues concerning the provision by local exchange carriers (LECs) of a service that automatically blocks international calls.[1]

In the *Further Reconsideration and FNPRM* in CC Docket 91-35, the Commission requested comment on whether it should require LECs to provide international blocking to residential customers in order to prevent toll fraud. Interested parties commented on this issue, and the LECs also provided general information about the costs and difficulties that they would incur to provide this service to residential customers. Parties then commented on the LECs' cost claims. Parties have not, however, commented about any benefits that residential customers may receive by using international blocking for purposes other than toll fraud prevention. Since this record was established, there has been a significant increase in the number of complaints the Commission has received about information services provided through international toll calls. Such calls are directly dialed by domestic telephone subscribers to information providers located in foreign countries who offer adult-oriented information services. These services arose after the Commission adopted its "pay-per-call" rules in 1991 governing 900 and other information services.[2] The use of international calls to provide domestic information services evades important consumer safeguards in our "pay-per-call" and other rules. Such safeguards include, for example, the requirement that LECs offer a service that blocks these calls and that they identify the calls separately on subscribers' bills. Moreover, the Federal Trade Commission's "pay-per-call" rules require information providers to include a preamble explaining the cost of the call and to allow the caller to hang up before charges commence. *See* 16 C.F.R. §§ 308.5(a) and (b).

The Commission hereby asks for comments on whether, and in what manner, residential customers would benefit from having the capability to block international calls. In particular, we request comments on whether residential customers would benefit from being able to block international calls in order to limit access to information services. We also solicit comments from the LECs on the costs that the LECs would incur to provide international blocking capability to residential customers. The LECs' comments on costs should include the categories of costs (*e.g.*, switching, administration, *etc.*) that would be incurred to provide international blocking capability to all residential customers. They should also show the extent to which those costs would be reduced by not providing blocking in areas in which it would not be technically feasible and economically reasonable to do so. For each instance in which a LEC claims that it would not be technically feasible and economically reasonable to provide residential blocking, its comments should specify the type of equipment, the number of end offices affected, the nature of the problem (*i.e.*, inadequate switch memory) and the percentage of residential access lines that would not receive international blocking. Also, the LEC should provide a timetable indicating when, under its current investment plans, it would become technically feasible and economically reasonable to offer international blocking to residential customers from those end offices.

Interested parties may file comments on these issues no later than **April 24, 1995**. Replies should be filed by **May 8, 1995**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Thomas G. David, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

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[1] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Notice of Proposed Rule Making, 6 FCC Rcd 1448 (1991), Report and Order and Further Notice of Proposed Rule Making, 6 FCC Rcd 4736 (1991); Second Report and Order, 7 FCC Rcd 3251 (1992); Order on Reconsideration, 7 FCC Rcd 4355 (1992); and Order on Further Reconsideration and Further Notice of Proposed Rulemaking, 8 FCC Rcd 2863 (1993) (*Further Reconsideration and FNPRM*).

[2] *See* Sections 64.1501 to 64.1515 of the Commission's rules, 47 C.F.R. §§ 64.1501 - 64.1515.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cost Support Material
to be Filed With
1995 Annual Access Tariffs

South Dakota Network
Application for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1995; Released: March 27, 1995

By the Chief, Tariff Division:

I. INTRODUCTION

1. On February 24, 1995, South Dakota Network, Inc. (SDN) filed an application for waiver of certain requirements of the Common Carrier Bureau's (Bureau's) recently adopted Tariff Review Plans document (*1995 TRP*),[1] which sets forth summary cost support material local exchange carriers (LECs) must file to support their 1995 annual access tariff filings.[2] In particular, SDN seeks a waiver of the *1995 TRP* requirements that do not apply to its operations or that request data for periods prior to the time that SDN commenced service. For the reasons discussed below, we grant SDN's application for waiver.

II. BACKGROUND

2. SDN states that it provides centralized equal access to 15 independent LECS in the State of South Dakota.[3] It indicates that SDN's interstate rate structure includes two primary rate elements – centralized equal access and access transport.[4] As a provider of centralized equal access service, SDN maintains that it is exempt from the Commission's requirements to provide direct trunked transport service and entrance facilities, citing the Commission's *Transport Rate Structure and Pricing Reconsideration*.[5] Therefore, SDN requests a waiver of the *1995 TRP* requirement to complete Chart RORMD-5, page 1 of 1, which seeks historical information regarding the demand for local transport service.[6] It also requests a waiver of any other *1995 TRP* requirements to submit information for services that SDN does not provide.[7]

3. SDN further explains that because it became fully operational on August 11, 1992, it does not have or maintain accounting data for prior periods.[8] It therefore requests a waiver of the *1995 TRP* requirements to complete Charts RORCOS-2, page 3 of 3, RORMD-1, page 3 of 3, and RORDMD-4, page 1 of 1.[9] SDN argues that these pages require accounting data for periods prior to the third quarter of 1992, the period that SDN became fully operational.[10] In addition, SDN notes that Chart RORRTE-3, pages 1 of 2 and 2 of 2 request information for Company Study Areas (COSAS). SDN seeks a waiver of the *1995 TRP* requirement to complete these pages because it does not have a study area.[11] Finally, citing the Bureau's *1994 TRP Waiver Order*, SDN notes that it requested and received a waiver of certain 1994 TRP filing requirements that were not applicable to its centralized equal access operations or that required data for periods prior to the time SDN commenced service.[12] SDN's waiver request is unopposed.

III. DISCUSSION

A. *Standard for Waiver*

4. Commission rules may be waived for good cause shown.[13] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[14] In addition, the United States Court of Appeals for the District of Columbia Circuit has stated that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[15] Waiver is thus appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.[16]

5. We agree with SDN that it should not be required to submit information for services it does not provide as this information would not assist the Commission and interested parties in reviewing SDN's access tariff filing. More-

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[1] *See* Cost Support Material to be Filed with 1995 Annual Access Tariffs, Tariff Review Plans, DA 95-264 (rel. Feb. 17, 1995) (*1995 TRP*).

[2] The *1995 TRP*, like previous TRPs, requires LECs to use particular data formats and to display basic cost, demand, and rate information in a consistent manner according to the class of LEC. This uniform presentation of the LECs' cost support data aids the Commission and interested parties in their review of the LECs' annual access tariff filings.

[3] SDN Application at 1.

[4] *Id.*

[5] *Id.* at 2, citing *Transport Rate Structure and Pricing*, CC Docket No. 91-213, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 (1993) (*Transport Rate Structure and Pricing Reconsideration*).

[6] *Id.* at 3.

[7] *Id.* at 4.

[8] *Id.* at 1.

[9] Carriers such as SDN, that do not elect price cap treatment for annual access year 1995 but instead elect treatment as baseline rate of return (ROR) companies, are subject to the requirements of Section 61.38 of the rules. These baseline rate of return companies must file the ROR TRP included as Appendix B in the *1995 TRP*.

[10] *Id.* at 2.

[11] *Id.* at 3.

[12] *Id.* at 2, citing Commission Requirements for Cost Support Material To Be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, Petitions for Waivers, Order, 9 FCC Rcd 1604 (Com. Car. Bur. 1994) (*1994 TRP Waiver Order*).

[13] *See* 47 C.F.R. § 1.3.

[14] *See Northeast Cellular Tel. Co. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

[15] *WAIT Radio v. F.C.C.*, 418 F.2d. 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[16] *Northeast Cellular*, 897 F.2d at 1166.

over, it was not the Bureau's intention to require carriers to file TRPs for access elements for which they do not file tariffs. Therefore, we grant SDN's request that it not be required to file Chart RORDMD-5, page 1 of 1, as well as other charts requesting information for services that SDN does not provide. Furthermore, given that SDN did not become fully operational until the third quarter of 1992 and thus does not have accounting data for periods prior to that quarter, we agree with SDN that it is unable to provide certain of the historical data required to complete Charts RORCOS-2 page 3 of 3, RORMD-1, page 3 of 3, and RORDMD-1 page 3 of 3 in the *1995 TRP*. Therefore, we grant SDN's waiver request in this regard as well.

6. We emphasize that grant of the waivers requested by SDN does not materially affect the ability of the Commission and interested parties to evaluate SDN's proposed rates. Finally, we emphasize that aside from the limited waiver requests that we grant, SDN remains obligated to comply with the requirements of the *1995 TRP*.

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, and 0291, the application for waiver filed by the South Dakota Network IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

MOBILE DATACOM CORPORATION — File No. 814-DSE-P/L-93
Call Sign E930216

For Blanket Authority to Operate
10,000 Mobile Domestic Earth
Stations in the 1610-1626.5 MHz
and 3700-4200 MHz Frequency Bands

ORDER AND AUTHORIZATION

Adopted: March 30, 1995; Released: April 3, 1995

By the Chief, International Bureau

I. INTRODUCTION

1. With this order we grant, with conditions, Mobile Datacom Corporation's (MDC) application for blanket authority to construct and operate on a temporary basis 10,000 mobile earth stations to provide radiolocation and messaging services to mobile customers in the continental United States, Alaska, and adjoining waters and airspace. This will permit the public to receive services that would not otherwise be available.

2. The mobile earth stations are to access the radiodetermination satellite service (RDSS) packages on GE American Communications' (GE Americom's) Spacenet-3 and GSTAR-3 domestic fixed-satellites. The units uplink to the satellites in the 1610-1626.5 MHz (1.6 GHz) frequency band, which is allocated to both the "Big LEO" mobile satellite service and the radiodetermination satellite service. The units receive transmissions from the satellites in the 3700-4200 MHz frequency band, which is allocated to the fixed-satellite service (FSS). MDC requests a waiver of the Table of Frequency Allocations to permit it to use the 3700-4200 MHz frequency band for "outbound" links to the mobile terminal units. MDC further requests authority to operate the mobile units until the first Big LEO satellite authorized to operate in the 1.6 GHz band is launched. Motorola Communications, Inc. (Motorola) filed a petition to dismiss or deny the MDC application; TRW, Inc. (TRW), Constellation Communications, Inc. (Constellation) and Loral Qualcomm Satellite Services, Inc. (LQSS) filed comments.

II. BACKGROUND

3. In 1986, GTE Spacenet was authorized to incorporate RDSS packages on its Spacenet-3 and GSTAR-3 satellites for its customer, Geostar Positioning Corporation (Geostar).[1] These packages were to allow Geostar to provide two-way position location service to its customers until its dedicated three-satellite RDSS system was implemented.[2] But Geostar declared bankruptcy in February 1991. Its dedicated system was never built and operations using the GTE Spacenet satellite were suspended.

4. In May 1993, the Common Carrier Bureau authorized Newcomb Communications, Inc. (Newcomb) to construct and operate 10,000 mobile units to provide one-way position location service using the RDSS packages on the GTE Spacenet satellites.[3] The Commission found that this would permit the public to receive services that would not otherwise be available. The Bureau, however, was in the process of authorizing the Big LEO satellite services in the same bands and could not permit Newcomb's operations to affect the operations of any Big LEO system. Thus, Newcomb's authorization was conditioned to expire on the date on which a regularly licensed Big LEO provider in the 1610-1626.5 MHz band launched its first satellite.

5. In its application, MDC seeks authority similar to that granted to Newcomb. MDCs system differs in only one significant respect: MDC has requested authority to operate two-way mobile units, and a waiver of the Table of Frequency Allocations (Table) to allow it to use the 3700-4200 MHz frequency band for transmissions to the user.[4] MDC states that this waiver is necessary because no in-orbit satellite operates in the 2483.5-2500 MHz band designated for RDSS downlink transmissions. MDC asserts that it has been operating its system pursuant to a grant of special temporary authority based on compliance with the conditions in the Newcomb Order since August 1993,[5] and that no interference incidents have been reported.

6. Four Big LEO applicants oppose MDC's application. They argue that MDC's proposed operations could create harmful interference to Big LEO licensees. They urge the Commission to impose on MDC the same conditions that were applied to Newcomb. In particular, they assert that MDC's authority should expire upon launch of the first satellite by a Big LEO provider, and that MDC should be limited to 10,000 mobile terminal units.

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[1] *GTE Spacenet Corporation*, 1 F.C.C. Rcd. 1163 (Com. Car. Bur. 1986) (Spacenet package); *GTE Spacenet Corporation*, Mimeo No. 5175 (Com. Car. Bur. 1986) (GSTAR package).

[2] *See Geostar Corporation*, Mimeo No. 6144 (Com. Car. Bur. 1986). The dedicated satellites were to operate in the 1610-1626.5 MHz/2483.5-2500 MHz bands allocated to RDSS.

[3] *Newcomb Communications, Inc.*, 8 F.C.C. Rcd. 3631 (Com. Car. Bur. 1993) (Newcomb Order).

[4] In its original application, MDC requested authority to operate 50,000 user transceivers and asked that the Commission not establish a concrete termination date for MDC's operations. Similar provisions requested by Newcomb were not authorized in the Newcomb Order. MDC has since amended its application to accept the conditions imposed on Newcomb in full. *See* letter from Peter A. Rohrbach to Acting Sec. of Federal Communications Commission (Dec. 14, 1993), *See also* letter from Peter A. Rohrbach to Acting Sec. of Federal Communications Commission (Dec. 19, 1994).

[5] *See* letter from Chief, Domestic Facilities Division to Peter A. Rohrbach (Aug. 19, 1993). This authority includes a waiver of the Table to permit use of the 3700-4200 MHz band for outbound transmissions.

III. DISCUSSION

7. We grant MDC's application subject to certain conditions. As stated in the Newcomb Order, allowing the temporary use of existing satellites permits customers to receive services that would not otherwise be available. If temporary operations do not adversely affect other licensed satellites, the Commission readily authorizes their use.[6] Here, MDC seeks to use in-orbit RDSS packages to offer positioning and data services using the 1610-1626.5 MHz and the 3700-4200 MHz bands on a temporary basis, reinstituting Geostar's two-way service. MDC has been operating pursuant to special temporary authority for nearly one year and no incidents of interference to existing users have been reported. We do not expect this will change.

8. Nevertheless, should MDC's operations interfere with those of any other allocated service operating in the 1610-1626.5/3700-4200 MHz bands or in adjacent bands, we will require MDC to terminate operations immediately. Specifically, MDC may not interfere with the radioastronomy service, which operates on a co-primary basis in the 1610.6-1613.8 MHz band. Although we will not require MDC to obtain a coordination agreement similar to the one reached by Geostar and the National Science Foundation before awarding this license, MDC must observe the large protection areas around the 16 radioastronomy observatories in the United States. Further, MDC will be required to adhere to any national or international out-of-band emission standards that may be incorporated in the Commission's rules to protect the Global Navigation Satellite System (GNSS), and its Global Positioning System (GPS) and Global Orbiting Navigation Satellite System (GLONASS) components.[7] To protect GPS from interference from uplink transmissions in the 1610-1626.5 MHz band, the Commission has adopted out-of-band emission limits for mobile facilities operating in that band. Specifically, out-of-band emissions may not exceed an e.i.r.p. density of -70 dBW/1MHz averaged over any 20 millisecond period in any portion of the 1574.397-1576.443 MHz band. For any discrete spurious emissions in the same band (*i.e.*, bandwidth less than 600 Hz), the user transceiver e.i.r.p. density may not exceed -80 dBW.[8] RTCA SC 159 ad hoc, created to assess interference to the GNSS, is also studying out-of-band emission limits on MSS operations necessary to protect GLONASS operations.[9] Until the RTCA's final report is complete and new standards are adopted, if appropriate, we will require MDC to adhere to the e.i.r.p. limits contained in Section 25.213(b) of the Commissions Rules and to terminate interfering operations immediately upon notification by the Commission or by the National Telecommunications and Information Administration.

9. Further, we will not permit MDC's operations to affect the operation of any Big LEO system. Although MDC originally sought an open-ended grant for 50,000 mobile user units, it has now indicated it is willing to operate under the same terms as Newcomb.[10] No one has opposed grant of MDC's application under these terms. We therefore limit MDC to operating 10,000 mobile units and require it to terminate operations when the first Big LEO satellite is launched. We also require MDC to inform its customers that service will terminate upon launch of a Big LEO satellite and to maintain a record of the platforms on which each mobile unit is installed, specifying whether the terminals are used for land, maritime, or aeronautical service and identifying the name, address, and telephone number of the customer. Because we have licensed three Big LEO systems and expect service to be initiated in the next two to three years, we require MDC to implement additional safeguards not outlined in the Newcomb Order. To ensure that mobile users do not transmit after the required termination date, MDC must deploy transceivers that may be remotely deactivated through the use of the 3700-4200 MHz outbound link or must develop other suitable arrangements to ensure that transmissions are deactivated on a timely basis. Under the foregoing conditions, denying or deferring action on MDCs application will only serve to waste in-orbit capacity and deprive the public of service.

10. Thus, we grant MDC authority to construct and operate 10,000 mobile units on a non-interference basis to other existing satellite operators and only until an entity regularly licensed to provide service in the 1610-1626.5 MHz band has launched its first satellite. Any request for authority to operate after this date will be entertained only if MDC can conclusively demonstrate that its operations will not interfere with Big LEO operations in the band or if all operating Big LEO system licensees have agreed to MDC's operations. We also require MDC to inform its customers that service will terminate upon the launch of a regularly licensed Big LEO satellite.[11] Additionally, we grant MDC a waiver of the Table to permit satellite-to-mobile unit links in the 3700-4200 MHz band on the basis that these transmissions will not cause unacceptable interference into any other service authorized to use that band and will accept any interference from any of these services.

IV. CONCLUSION AND ORDERING CLAUSES

11. We find that the public interest, convenience and necessity will be served by allowing MDC to provide its proposed two-way position location and ancillary data services on a temporary basis. We recognize that dedicated Big LEO satellites may be brought into service before GSTAR-3 and Spacenet-3 are retired, and place MDC on notice that, in this event, it will be required to terminate operations even if the two satellites have not exhausted their operational capacity.

12. Accordingly, pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, and Section 0.261 of the Commissions rules, 47 C.F.R. § 0.261, IT IS ORDERED that Application File No. 814-DSE-P/L-93 IS GRANTED as set forth above and that Mobile Datacom Corporation IS

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[6] *See* Newcomb Order at para. 6, *supra; Qualcomm, Inc.*, 4 F.C.C. Rcd. 1543 (1989).

[7] *See* Memorandum of Understanding between the FCC, the National Telecommunications and Information Administration (NTIA), and the Federal Aviation Administration (FAA) regarding co existence between mobile earth terminals and GPS and GLONASS receivers operating in nearby frequencies.

[8] *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 F.C.C. Rcd. 5936 (1994) at para. 130. 47 C.F.R. § 25.213(b).

[9] *Id.* at para. 137.

[10] *See* note 4, *supra*.

[11] In this regard, Big LEO licensees should notify MDC, as well as Newcomb, upon receipt of any confirmed launch dates and upon actual launch of the first satellite in the system.

AUTHORIZED to construct 10,000 mobile units and to operate the units in the 1610-1626.5 MHz band in the continental United States, Alaska, and adjoining territorial waters and airspace via the GSTAR-3 and Spacenet-3 satellites as specified in its application and subject to the following conditions:

(a) This authorization will terminate on the date on which a regularly licensed "Big LEO" provider in the 1610-1626.5 MHz frequency band launches its first satellite; and

(b) no harmful interference shall be caused to any other allocated service in the band, and operation by Mobile Datacom Corporation shall cease immediately upon notification of interference; and

(c) Mobile Datacom Corporation must comply with the e.i.r.p. limits in Section 25.213(b) of the Commissions Rules, 47 C.F.R. § 25.213(b); no harmful interference shall be caused to Global Positioning System receivers, or Global Orbiting Navigation Satellite System receivers, when used as part of the Global Navigation Satellite System, and operation by Mobile Datacom Corporation shall cease immediately upon notification of interference by the Commission or by the National Telecommunications and Information Administration; and

(d) maritime operations may not commence until the Department of State informs the Commission that the U.S. has fulfilled its obligations under Article 8 of the INMARSAT Convention.

13. IT IS FURTHER ORDERED that Mobile Datacom Corporations request for interim waiver of the Table of Frequency Allocations IS GRANTED to permit the use of the 3700-4200 MHz frequency band for outbound channels subject to the conditions set forth in the preceding paragraph and subject to the additional condition that Mobile Datacom Corporation accept any interference from allocated services operating in that frequency band.

14. IT IS FURTHER ORDERED that Mobile Datacom Corporation shall file with the Commission annually the number of terminal units constructed within that year, specifying whether the terminals are used for land, maritime or aeronautical service.

15. IT IS FURTHER ORDERED that Mobile Datacom Corporation shall maintain a record of the platforms on which each terminal unit is installed, and shall specify the name, address, and telephone number of the customer.

16. IT IS FURTHER ORDERED that Mobile Datacom Corporation is required to inform its customers that service is being provided pursuant to a grant of interim authority and will terminate pursuant to the conditions specified in paragraph 12(a), above.

17. IT IS FURTHER ORDERED that Mobile Datacom Corporation must deploy transceivers capable of remote deactivation, or institute an appropriate procedure for timely deactivation to insure service is terminated as specified in paragraph 12(a), above.

18. IT IS FURTHER ORDERED that the Petition to Dismiss or Deny filed by Motorola Satellite Communications, Inc. IS GRANTED to the extent set forth herein and IS OTHERWISE DENIED.

19. Mobile Datacom Corporation is afforded thirty days to decline the authorization as conditioned. Failure to respond within this period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Transmittal Nos.
Tariff F.C.C. Nos. 1 and 13	8172 and 8173

ORDER

Adopted: March 30, 1995; Released: March 31, 1995

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. On February 16, 1995, AT&T Corp. (AT&T) filed the above-referenced transmittals proposing amendments to various provisions in its tariffs. Transmittal No. 8172 restructures AT&T Commercial Long Distance Service by introducing transport rates and service charges for Operator Station, Person-to-Person and Real Time Rated calls, and charges for the Operator Surcharge and Busy Line Verification and Interruption. It also introduces rates and regulations for the Collect calling feature and revises usage rates from various countries. The portion of Transmittal No. 8173 that was filed on 45 days' notice increases the Initial Period and Additional Period charges for various Long Distance Message Telecommunications Service schedules for operator handled, Customer Dialed and Operator Dialed calls as indicated in AT&T Tariff Nos. 1 and 13 and increases the Directory Assistance charge per call.

2. On February 27, 1995, Gerald Schwartz, an individual acting *pro se*, filed a petition to reject, suspend and investigate, AT&T Transmittal Nos. 8172 through 8176.[1] AT&T did not file a reply to the petition.

3. In its petition, Schwartz protests all of the rate increases contained in the above-referenced tariff transmittals on the grounds that: (1) AT&T is increasing these rates solely for the purpose of misleading the public relating to its real rate structure; (2) AT&T offsets its advertised discounts with rate increases; (3) AT&T's requests in these transmittals are meant to hamper competition by increasing rates so that AT&T can then offer "sham" discount programs; (4) AT&T's rate increase is excessive and unjustified; (5) AT&T's rate increase is unnecessary; (6) AT&T's rate increase is for the sole purpose of obtaining funds for deceptive advertising and to offset its discounts; and (7) AT&T's competition will be harmed because AT&T will be able to claim larger discounts when its net profit will remain unchanged.

4. Transmittal No. 8172 and the remainder of Transmittal No. 8173[2] are scheduled to take effect on April 2, 1995.

5. The Tariff Division has reviewed AT&T Communications' Transmittal No. 8172, the portion of Transmittal No. 8173 that was filed on 45 days' notice, and the related pleadings. We conclude that these filings do not warrant rejection because they do not, on their face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject and suspend and investigate AT&T Communications Tariff F.C.C. Nos. 1 and 13, Transmittal Nos. 8172 through 8176, filed by Gerald Schwartz, an individual, IS DENIED as to Transmittal No. 8172 and the portion of Transmittal No. 8173 filed on 45 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

David Alan Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

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[1] In AT&T Communications Tariff F.C.C. Nos. 1 and 13, Order, (March 9, 1995), the Tariff Division dismissed Schwartz's petition as it related to the portions of Transmittal No. 8173 filed on 15 days notice and denied it as to Transmittal Nos. 8174 through 8176.

[2] Some of the domestic rate increases in Transmittal No. 8173 were filed on 15 days' notice and took effect on March 3, 1995.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

U S WEST COMMUNICATIONS, INC. File No. W-P-C-6868

For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area.

ORDER

Adopted: March 29, 1995; Released: March 31, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 8, 1995, U S WEST Communications, Inc. (U S WEST) filed a Request for Extension and Contingent Request for Special Temporary Authority (*Request for Extension)* for its technical trial of video dialtone service in Omaha, Nebraska.[1] In December 1993, the Commission granted U S WEST authority pursuant to Section 214 of the Communications Act of 1934, as amended,[2] to construct and operate facilities necessary to conduct a six-month technical trial to be followed by a twelve-month market trial of video dialtone service in portions of the Omaha, Nebraska service area.[3]

2. In its *Request for Extension,* U S WEST seeks permission to extend its technical trial authority until it has an effective trial tariff in place, or six months, whichever comes first. For the reasons set forth below, we grant U S WEST's request.

II. BACKGROUND

3. In the *Omaha Authorization,* the Commission authorized U S WEST to offer video dialtone service within its Omaha, Nebraska service area on a trial basis. The Commission authorized U S WEST to construct facilities for the technical trial that would pass 2,500 households.[4] In January 1995, the Commission allowed U S WEST to modify the *Omaha Authorization,* approving a revised analog channel allocation plan.[5]

4. U S WEST states that, as of the date of its *Request for Extension,* programmer-customers have provided only a very limited amount of video programming over analog channels to subscribers in Omaha.[6] One portion of the analog channel allocation plan is a facilitation process in which programmer-customers select video programming to be provided on common and shared analog channels.[7] That channel allocation process was conducted on January 19, 1995 and video programming was selected and channel assignments designated.[8] Programmer-customers have been given until April 1, 1995, to obtain the program rights necessary to carry the common and shared programming.[9]

5. U S WEST states that it formally announced the beginning of the digital portion of its technical trial on October 3, 1994. At that time, U S WEST began testing the receipt of digital video signals from programmer-customers, but no digital signals were delivered to end users until January 6, 1995.[10]

6. U S WEST believes that its authorization for the technical trial may end on April 3, 1995. U S WEST states that it and its programmer-customers need additional time to test the delivery of analog and digital services and to prepare for the market trial. U S WEST notes that it has not yet filed a video dialtone trial tariff, but expects to do so shortly.[11]

7. U S WEST believes that the public interest would be served by allowing it to extend its technical trial until it has an effective market trial tariff in place or for a six-month period, whichever comes first.[12] U S WEST argues that this extension would allow analog and digital providers to test services adequately before beginning a market trial. It asserts that this would serve both the public interest and the interests of trial participants.[13] U S WEST expects that it would be able to commence its market trial in June 1995.[14] No comments were filed on U S WEST's request.

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[1] On March 13, 1995, U S WEST's Request for Extension was placed on public notice and interested parties were given an opportunity to comment. Public Notice, Pleading Cycle Established for Comments on U S WEST's Request for Extension of its Technical Trial of Video Dialtone Service (File No. W-P-C 6868), DA 95-472 (released March 13, 1995).

[2] 47 U.S.C. § 214.

[3] U S WEST Communications, Inc., 9 FCC Rcd 184 (1993) (*Omaha Authorizaion), pet. for recon. pending.*

[4] U S WEST was given the choice by the Commission of offering the technical trial to 10,000 households. If it chose to do so, however, it had to charge for service after 30 days. *Omaha Authorization,* 9 FCC Rcd at 188-89, paras. 26-29. U S WEST chose to limit its offering to 2,500 households and not to charge end users for the service. Letter from Lawrence E. Sarjeant, Executive Director-Federal Regulatory, U S WEST to William F. Caton, Acting Secretary, FCC (Jan.21, 1994).

[5] U S WEST Communications, Inc., FCC 94-350 (rel. Jan. 6, 1995) (*Modified Omaha Authorization).*

[6] *Request for Extension* at 2-3.

[7] *Id.* at 2.

[8] *Id.* The facilitator reported to U S WEST on January 27, 1995. *Id.*

[9] *Id.*

[10] *Id.* at 3.

[11] *See id.* at 3-4, n.10.

[12] *Id.* at 4.

[13] *Id.*

[14] *See id.*

III. DISCUSSION

8. We conclude that an extension of U S WEST's technical trial will serve the public convenience and necessity, and therefore grant the *Request for Extension*.[15] An extension of time will allow U S WEST to more thoroughly test advanced analog and digital technology, fulfilling the objectives of the trial and promoting the Commission's goals of video dialtone.[16] We agree that an extension of U S WEST's technical trial would allow U S WEST to prepare for an expanded market trial.[17]

9. Moreover, we note that U S WEST's *Request for Extension* is limited in duration. U S WEST expects to commence its market trial by June 1995. U S WEST requests that it continue its technical trial until it has an effective market trial tariff in place, or six months, whichever comes first. Under these circumstances, we do not find the extension period unreasonable or contrary to the public interest.[18]

10. Furthermore, we have received no comments or statements in opposition to U S WEST's request. The record contains no indication that any party would be harmed by extending U S WEST's 2,500 household technical trial.

11. Finally, U S WEST's operation of the technical and market trials remains subject to each and every condition, as applicable, contained in the *Omaha Authorization* and the *Modified Omaha Authorization*. U S WEST must continue to report to the Commission on the status of its technical and market trials.[19]

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and authority delegated to the Chief of the Common Carrier Bureau by Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the Request for Extension filed by U S WEST Communications, Inc. IS GRANTED, and that the technical trial may continue for the lesser of six months or when U S WEST has an effective market trial tariff in place for its trial of video dialtone service in Omaha, Nebraska.

13. IT IS FURTHER ORDERED that the conditions and requirements contained in the *Omaha Authorization* and the *Modified Omaha Authorization* remain in full effect, and nothing in this Order should be construed to modify those orders in any way, except to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[15] *See* 47 U.S.C. § 214(a); 47 C.F.R. § 63.01.

[16] *See Omaha Authorization*, 9 FCC Rcd at 185, para. 7; *see also* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 248, para. 3 (1994).

[17] *See Request for Extension* at 4.

[18] *See, e.g.*, Carolina Tel. & Tel. Co., DA 94-1593 (released Com. Car. Bur. Dec. 28, 1994) (approving a two-year technical and market trial of video dialtone service because half of the proposed homes to be passed have not yet been constructed).

[19] *Omaha Authorization*, 9 FCC Rcd at 191, para. 35(i); *Modified Omaha Authorization*, FCC 94-350 at 13, para. 24.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY — File No. W-P-C-6858

For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities to test a new technology for use in providing video dialtone service within a specific area in Connecticut

ORDER

Adopted: March 29, 1995; Released: March 31, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On January 31, 1995, the Southern New England Telephone Company (SNET) filed a Motion to Extend its video dialtone trial operating in West Hartford, Connecticut.[1] The Commission granted SNET's Section 214 application to conduct a one-year technical and market trial of video dialtone service in West Hartford, Connecticut in October 1993.[2] The Commission authorized SNET to construct facilities that would ultimately pass 1,600 homes.[3] About a year later, the Commission authorized SNET to expand its video dialtone trial and deploy network facilities in two additional areas near Hartford and Stamford, Connecticut, ultimately passing 150,000 homes.[4] By its motion, SNET requests permission from the Commission to extend its trial authority, which expires on April 1, 1995, and synchronize the West Hartford Trial with the Expanded Trial. Cablevision Systems Corp. opposes SNET's motion to extend the West Hartford Trial.[5] For the reasons set forth below, we grant SNET's request.

II. DISCUSSION

The Motion

2. SNET maintains that the public interest will be served by grant of its motion because an extension will permit SNET to test previously unavailable digital compression equipment, asynchronous transfer mode (ATM) switching, and digital set-top converters.[6] SNET states that, at the time it planned the West Hartford Trial, it anticipated that digital compression equipment and set-top converters would be available for testing during the trial.[7] SNET now expects, based on discussions with equipment vendors, that digital equipment and associated software will be available for installation in the fourth quarter of this year.[8] By allowing the trial to continue for a limited period of time, SNET contends that it will be able to assess the technical, operational, and economic merits of digital video dialtone service.[9] SNET also contends that allowing it to synchronize the West Hartford Trial with the Expanded Trial will serve the interests of both video programmer-customers currently on the West Hartford platform and subscribers of video programming services.[10] Thus, SNET requests that the Commission grant its motion and link the two trials so that the West Hartford Trial ends when the Expanded Trial ends.[11]

Cablevision's Opposition

3. Cablevision argues that SNET's motion should be denied because SNET has failed to demonstrate that an extension will serve the "public convenience and necessity.[12] Cablevision asserts that this extension request is part of an overall strategy to game the process and avoid regulatory scrutiny for the deployment of its video dialtone

[1] On February 7, 1995, SNET's Motion was placed on public notice and interested parties were given an opportunity to comment. Public Notice, Pleading Cycle Established for Comments on SNET's Motion for Extension of its Trial of Video Dialtone Service (File No. W-P-C-6858), DA 95-174 (released Feb. 7, 1995).

[2] The Southern New England Tel. Co., 9 FCC Rcd 1019 (1993) (*West Hartford Order*).

[3] *Id.* at 1021, para. 5 n.13.

[4] The Southern New England Tel. Co., 9 FCC Rcd 7715 (1994) (*Expanded Trial Order*).

[5] Opposition of Cablevision Systems Corporation to the Southern New England Telephone Company's Motion to Extend, filed Feb. 22, 1995 (Opposition).

[6] SNET Motion at 2-4.

[7] *Id.* at 3.

[8] *Id.* (citing Affidavit of Scott G. Wilcox, Director-Multimedia Technical Operations). Consistent with its underlying authorization, SNET states that investment, expenses, and operating costs for this equipment will be borne by company shareholders, and will not appear in any SNET rate base or as a regulated expense without prior approval from the Commission. *Id.* at 4 (citing *West Hartford Order*, paras. 18, 21(a)).

[9] *Id.* at 3.

[10] *Id.* at 6-7. SNET asserts that the 53 programmers currently on the West Hartford platform (some of which have committed to participating in the Expanded Trial) would be "disadvantaged" if the trial was disrupted or discontinued. *Id.* at 7. SNET also argues that the extension will help it assess programmer-customer willingness to pay for video dialtone, one of the trial's original objectives. *Id.*

[11] *Id.* at 6 (SNET requests that, like the Expanded Trial, the West Hartford Trial terminate one year after the first customer takes service under an effective video dialtone market trial tariff: "Concurrent extension of [the] West Hartford [trial] would then permit both Trials to end in June, 1996"). SNET states that it will continue to comply with the reporting requirements for its trials, and specifically requests permission to consolidate future West Hartford Trial and Expanded Trial reports into one joint report. *Id.* at 7.

[12] *See* 47 U.S.C. § 214(a). Cablevision urges the Commission to review SNET's December 22, 1994 West Hartford Trial report before acting on the instant motion, because it alleges that SNET has not complied with the *West Hartford Order*'s reporting requirements by failing to provide certain financial information, failing to allocate common costs and overheads, and failing to evaluate the market for video dialtone service. Opposition at 13.

facilities.[13] It further contends that the unfairness of permitting SNET to compete in the video marketplace without full review is compounded by a state regulatory situation that does not yet permit competition in local exchange telecommunications services.[14]

4. Cablevision argues that SNET has failed to carry its burden and demonstrate that the public convenience and necessity will be served by an extension of its trial. Cablevision contends that SNET has not provided the Commission with the cost and revenue data and "service description" that would enable the Commission to determine whether SNET's proposal is economically justified.[15] Moreover, Cablevision claims that the cost information relied upon by SNET in its original application is no longer valid.[16] Cablevision also argues that SNET has not shown how the proposed extension will advance the West Hartford Trial's objectives, and why these objectives cannot be met by SNET's approved Expanded Trial.[17] Indeed, Cablevision asserts that an extension is unnecessary because SNET's West Hartford Trial has already achieved its main goals.[18] In addition, Cablevision claims that the proposal is inconsistent with the Commission's policy that trials be limited in duration because it is not clear from SNET's motion when the trial will terminate.[19] According to Cablevision, SNET has not provided sufficient assurances that digital equipment will be available for testing in 1995.

Discussion

5. We conclude that an extension of SNET's West Hartford Trial will serve the public convenience and necessity, and therefore grant the Motion to Extend.[20] We find unpersuasive Cablevision's argument that SNET has failed to show how the extension will further the trial's objectives. The extension of time will permit SNET to acquire and test advanced digital technology, fulfilling the objectives of the trial and promoting the Commission's goals of video dialtone.[21] Indeed, as part of its original plan for the West Hartford Trial, SNET planned to offer on-demand and several interactive services -- services made possible by various digital technologies, including a video server, video switch, and radio frequency (RF) modulators.[22] Because certain equipment has not been available, SNET states that it has been unable to "test *any* digital components."[23] Although SNET will be able to test this digital equipment in the Expanded Trial, we believe that it would not serve the public interest to deny SNET's motion.

6. In addition, an extension of SNET's 1,600-home trial will enable it to conduct its approved market test for the 1,600-home area.[24] The *West Hartford Order* authorizes SNET to conduct both a technical and market trial of video dialtone service.[25] Until March, however, SNET had not filed a market trial tariff for the West Hartford video dialtone service area. The Commission has previously concluded that, in order to fulfill the goal of promoting an advanced, cost-effective telecommunications infrastructure, the public interest is served by encouraging market trials of video dialtone technology and services.[26] Finally, the record contains no indication that any party would be harmed by an extension of SNET's limited trial, and Cablevision has presented no persuasive reason for denying SNET's extension request.[27] We continue to believe that, at this early stage of video dialtone's deployment, the public interest is served by trials of advanced technology, and under the circumstances presented here, an extension of SNET's trial is justified.

7. We also believe that Cablevision has not presented persuasive evidence for us to conclude that SNET is attempting to evade or undermine the Commission's processes or procedures. After an initial review, SNET's December 22, 1994 West Hartford Trial Report appears to demonstrate that SNET is generally in compliance with the Commission's video dialtone and cost accounting rules. With respect to Cablevision's contention that it is unfair to permit SNET to enter the video marketplace, while competition does not yet exist in the local exchange marketplace, the Commission has stated that local competition is but one of the many factors that we may consider in the Section 214 process.[28] Although we strongly encourage competition in the local exchange marketplace, we conclude that it would not serve the public interest to deny or otherwise delay approval of this limited one-year extension, pending state regulatory action intended to open the local exchange market to competition.[29]

8. Further, with respect to the costs of this trial, Cablevision asks the Commission to hold SNET's motion to the standard typically reserved for Section 214 applica-

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[13] *Id.* at 2-4.

[14] *Id.* at 3.

[15] *Id.* at 5-6.

[16] Cablevision argues that, prior to making a final decision on the motion, the Commission should request additional cost information from SNET and require SNET to specify a start and end date for the trial. *Id.* at 5.

[17] *Id.* at 12-13.

[18] *Id.* at 12.

[19] *Id.* at 9-10.

[20] *See* 47 U.S.C. § 214(a); 47 C.F.R. § 63.01.

[21] *See West Hartford Order*, 9 FCC Rcd at 1019, para. 4 & nn.8, 12; *see also* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 248, para. 3 (1994) (*Video Dialtone Reconsideration Order*).

[22] *West Hartford Order*, 9 FCC Rcd at 1019, para. 4 & nn.8, 12.

[23] Reply of The Southern New England Telephone Company at 8 (filed March 3, 1995) (SNET Reply). It is our understanding that end users will need digital set-top converters in order to receive digital services, and that SNET plans to test the interoperability of set-tops with the network. Pursuant to Section 68.110(b) of the Commission's rules and the so-called "all carrier rule," SNET is required to disclose to all interested parties, reasonably in advance, "all information relating to network design . . . insofar as such information affects . . . the manner in which interconnected CPE [customer premises equipment] operates." Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 FCC 2d 50, 82-83 (1980); 47 C.F.R. § 68.110(b).

[24] *See West Hartford Order*, 9 FCC Rcd at 1019, para. 4.

[25] *Id.* at 1021, para. 12.

[26] *Id.*

[27] SNET states that, as of December 31, 1994, there were 336 end users participating in the West Hartford test. SNET Reply at 8 n.33.

[28] *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 313, para. 142.

[29] *Id.* at 372, para. 275 (stating that the Commission would not defer consideration of Section 214 video dialtone applications pending the outcome of applicable rulemakings); *see supra* para. 5 (describing the benefits this trial may achieve).

tions for commercial video dialtone service. We find Cablevision's arguments regarding the trial's costs uncompelling. In the orders authorizing the West Hartford Trial and the Expanded Trial, the Commission applied a different standard to the cost and revenue data submitted because these were applications to conduct limited video dialtone trials.[30] The Commission did not base its approval on a detailed estimated cost and revenue showing, but rather, it concluded that SNET had made a minimal demonstration of economic justification and the public interest would be served by the proposed project. To protect telephone ratepayers, programmer-customers, and end users, the Commission required that SNET "segregate all costs incurred in providing the basic platform into subsidiary accounting records and to assign these costs to the video dialtone trial."[31] In addition, the Commission required that, to the extent costs are not recovered from future video dialtone services, they must be absorbed by SNET shareholders and not by regulated telephone ratepayers.[32] We believe that these conditions, among others, will adequately protect telephone ratepayers and video competitors from cross-subsidization and other anticompetitive conduct. Under this standard, arguments that SNET's original cost projections are underestimated or dated and should be replaced with new data are not compelling.

9. We also reject Cablevision's contention that SNET has proposed an open-ended trial. The record shows that SNET proposes to terminate the West Hartford Trial one year after the first customer takes service in the Expanded Trial under an effective video dialtone market trial tariff.[33] On March 9, 1995, SNET filed a tariff for the one-year market test period of the Expanded Trial.[34] The market trial tariff is pending and has a scheduled effective date of May 1, 1995. Thus, the Expanded Trial is likely to begin this summer, and certainly no later than the fall. We do not find, under these circumstances, the extension period unreasonable or contrary to the public interest.[35] Moreover, Cablevision's claim that SNET has provided inadequate assurances that digital equipment will be available for the trial is not persuasive because SNET, like many other local telephone companies exploring video dialtone, is relying on the representations of equipment vendors, who are in the best position to project when certain digital equipment will be available. We believe that SNET is relying on the best information available at this time.

III. CONCLUSION

10. Based on the reasons discussed above, we conclude that the public convenience and necessity will be served by granting SNET's motion and permitting it to extend its West Hartford Trial and synchronize the trial with the Expanded Trial. SNET's operation of the West Hartford Trial remains subject to each and every condition, as applicable, contained in the *West Hartford Order*. SNET must continue to report to the Commission on the status and progress of the West Hartford Trial, but may combine into one filing the reports regarding the West Hartford Trial and the Expanded Trial, subject to the following conditions.[36] SNET must file its second six-month West Hartford Trial report no later than June 1, 1995, and thereafter, SNET must file the next combined report six months after the start of the Expanded Trial. If the Expanded Trial begins after September 1, 1995, however, SNET must file a West Hartford Trial-only report on or before December 1, 1995. Finally, SNET may also combine into one submission the quarterly summaries of the accounting records for the trials.[37]

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and authority delegated to the Chief of the Common Carrier Bureau by Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the Motion to Extend filed by the Southern New England Telephone Company IS GRANTED, and that the West Hartford Trial may continue for no more than one year after the commencement of the market trial period of the Expanded Trial.

12. IT IS FURTHER ORDERED that SNET file the second six-month West Hartford Trial report no later than June 1, 1995, and thereafter, is required to file combined reports on the West Hartford Trial and Expanded Trial at six month intervals after the start of the market trial period of the Expanded Trial. If the Expanded Trial begins after September 1, 1995, however, SNET must file a West Hartford Trial-only report on or before December 1, 1995 and file a separate report covering the Expanded Trial six months after the market trial begins. The Expanded Trial-only report would be due within sixty (60) days of the six-month anniversary of the start of the market trial. If the Expanded Trial begins prior to September 1, 1995, SNET may combine into one filing the reports concerning the West Hartford and Expanded Trials. SNET may also combine into one filing the quarterly summaries of the accounting records for the trials.

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[30] The Commission has concluded that "a trial [application], by definition, is not generally susceptible to the same level of precision" as an application for permanent, commercial video dialtone service. *Expanded Trial Order*, 9 FCC Rcd at 7737, para. 37; *see* New York Tel. Co., 8 FCC Rcd 4325, 4330, para. 26 (1993); U S WEST Communications, Inc., 9 FCC Rcd 184, 188 n.57 (1993).

[31] *West Hartford Order*, 9 FCC Rcd at 1022-23, para. 18.

[32] *See, e.g., West Hartford Order*, 9 FCC Rcd at 1023, paras. 18, 21(a).

[33] SNET Reply at 9; *see Expanded Trial Order*, 9 FCC Rcd at 7748, para. 57.

[34] Transmittal No. 641, revising SNET's Tariff FCC No. 40 (filed March 9, 1995).

[35] *See, e.g.*, Carolina Tel. & Tel. Co., File No. W-P-C-6999, DA 94-1593 (released Com. Car. Bur. Dec. 28, 1994) (approving a two-year technical and market trial of video dialtone service because half of the proposed homes to be passed have not yet been constructed).

[36] *West Hartford Trial*, 9 FCC Rcd at 1023, para. 21(d); *Expanded Trial Order*, 9 FCC Rcd at 7749, para. 58(h).

[37] *See Video Dialtone Reconsideration Order*, 10 FCC Rcd at 326, para. 173.

13. IT IS FURTHER ORDERED that the conditions and requirements contained in the *West Hartford Order* and the *Expanded Trial Order* remain in full effect, and nothing in this Order should be construed to modify those orders in any way, except to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

FCC 95-2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	**CC Docket No. 90-132**
Competition in the Interstate	)	
Interexchange Marketplace	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: January 3, 1995 **Released:** February 17, 1995

By the Commission:

I. Introduction

1. On August 1, 1991, we adopted a Report and Order in this proceeding concluding an examination of the state of competition in the interstate interexchange marketplace and adapting our regulatory policies to reflect this competition.[1]

2. Eleven parties filed petitions seeking reconsideration of the Interexchange Order.[2] We have already addressed reconsideration requests relating to the bundling of 800 services

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[1] Competition in the Interstate Interexchange Marketplace, Report and Order, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991) ("Interexchange Order"); Order, CC Docket No. 90-132, 6 FCC Rcd 7255 (Com.Car.Bur. 1991); Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991) ("Sua Sponte Reconsideration Order"); Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677 (1992) ("Reconsideration Order"); Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2659 (1993) ("March 1993 Order"), petition for review docketed sub nom. AT&T v. FCC, No. 93-1306 (D.C. Cir. filed May 10, 1993); Second Report and Order, 8 FCC Rcd 3668 (1993) ("Second Report"); Memorandum Opinion and Order, 8 FCC Rcd 5046, (adopted July 15, 1993, released July 26, 1993) ("Fresh Look Petition Order").

[2] Parties filing petitions, oppositions, and replies in this proceeding are listed at Appendix A. WilTel asks us to reconsider the Interexchange Order for the reasons set forth in CompTel's petition. Thus, when we discuss CompTel's arguments, we are also discussing WilTel's arguments.

and inbound services with other services.[3] We now address the remaining issues raised on reconsideration and, as discussed below, affirm our findings in the Interexchange Order with certain minor modifications.[4]

II. Background

3. In the Interexchange Order, we undertook an examination of the state of competition in the interstate interexchange marketplace. We found that most business services are subject to substantial competition. Based on this conclusion, we further streamlined our regulation of most of AT&T's business services, while retaining price cap regulation for two services that we found to be less competitive -- 800 services and analog private line services.[5] We also authorized all interexchange carriers (IXCs) to offer service pursuant to individually negotiated contract rates that are generally available to similarly situated customers.[6] In addition, we eliminated nondiscrimination reporting requirements for AT&T services subject to further streamlining, and the requirement that AT&T submit annually an

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[3] See supra n. 1.

[4] Alascom, arguing that competition in Alaska is as broad or broader than competition nationally, asks us to reduce our tariff regulation of its private line and large customer service offerings. The issues raised by Alascom are outside the scope of this proceeding. We note that in May 1994, the Commission adopted, with modifications, the Final Recommended Decision of the Federal-Alaska Joint Board setting forth a new market structure plan for Alaska. See Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, 9 FCC Rcd 3023 (1994). That plan did not include provisions for streamlined regulation of Alascom's private line or other business services. We note also that AT&T has agreed to purchase all outstanding shares of Alascom and has filed an application requesting Commission approval of the transfer. See Application # WPC 7037, December 15, 1994.

[5] Our conclusion that 800 services were not fully competitive was based on the lack of 800 number portability. In May 1993, 800 numbers became portable. Accordingly, on May 14, 1993, we extended further streamlined regulation to AT&T's 800 services. See Second Report and Order, 8 FCC Rcd 3668.

[6] Our contract carriage regime allows AT&T to include in its contract-based tariffs only those services that are subject to further streamlined regulation; other IXCs may include any service in their contract-based tariffs.

independent audit report on its installation and maintenance procedures.[7] Finally, we eliminated the comparably efficient interconnection (CEI) filing requirements and CEI parameters for AT&T's provision of enhanced services that rely exclusively on basic services subject to further streamlining.

III. Petitions for Reconsideration

A. Contract Carriage for Business Services

(1) Contract-based Services

(a) Background/Petitions

4. The Interexchange Order authorized IXCs to offer services pursuant to individually negotiated contracts.[8] We concluded that our contract-based rates policy is consistent with the tariff filing requirements of Section 203 of the Communications Act and the nondiscrimination provision, Section 202(a), of the Act.[9] We did not, however, rule on whether any particular contract-based rates complied with those sections of the Act.

5. CompTel argues that our contract carriage regime violates sections 202 and 203 of the Act.[10] It asserts that these provisions were designed specifically to foreclose a dominant carrier, such as AT&T, from negotiating individual deals with select customers, arguing that such deals are unlawful even if generally available.[11] It contends our reliance on MCI Telecommunications Corp. v. FCC,[12] in support of our contract carriage policy was misplaced.

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[7] Interexchange Order, 6 FCC Rcd at 5908-5911.

[8] Interexchange Order, 6 FCC Rcd at 5899. At least fourteen days prior to the effective date of its contracts, AT&T must file a tariff with the Common Carrier Bureau based on the terms of the contract and containing all information required under Section 203 of the Act. All contracts must be generally available to similarly situated customers under substantially similar circumstances. Interexchange Order, 6 FCC Rcd at 5897.

[9] 47 U.S.C. §§ 202(a), 203.

[10] CompTel Petition at 3-15; Reply at 1-8.

[11] CompTel Petition at 9, citing Armour Packing Co. v. U.S., 209 U.S. 56 (1908) ("Armour Packing").

[12] MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990)(MCI v. FCC).

6. CompTel claims, further, that even if some contract carriage regime might be lawful, the one we adopted in this docket is not. It challenges the presumption of lawfulness accorded AT&T's contract-based tariffs, arguing that this policy is inherently at odds with previous Commission recognition that multiple tariff offerings for the same or similar services facilitate discrimination.[13] It claims that, at minimum, we must ensure that AT&T's contracts contain consistent, readily identifiable terms, conditions, rate structures, and eligibility criteria.[14] In addition, it argues, AT&T should not be permitted to deny service under a contract-based tariff to a prospective customer based on the customer's refusal to agree to new terms or conditions not contained in the filed contract-based tariff.

(b) Positions of the Parties

7. AT&T, Ad Hoc, and Bankers Coalition dispute CompTel's claim that our contract carriage regime is unlawful. They argue that Sea-Land Service, Inc. v. ICC,[15] along with MCI v. FCC, unequivocally establish the lawfulness of contract carriage.[16]

8. AT&T also challenges CompTel's assertion that the contract carriage regime will facilitate unlawful discrimination. It states that the availability requirements, coupled with the substantial competition for AT&T's business services, will ensure that all customers purchasing business service receive just, reasonable, and nondiscriminatory rates. AT&T also opposes the safeguards proposed by CompTel. AT&T notes that these safeguards are equivalent to the private line guidelines and that we have recognized that those guidelines are more suitable for generic tariffs than customized offerings.[17]

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[13] CompTel Petition at 13-15; CompTel Reply at 6-7, citing Private Line Rate Structure and Volume Discount Practices, 74 FCC 2d 226, 228 (1979), and Local Exchange Carrier Individual Case Basis DS3 Service Offerings, 4 FCC Rcd 8634 (1989).

[14] CompTel Petition at 15-19.

[15] 738 F.2d 1311 (D.C. Cir. 1984) ("Sea-Land").

[16] See AT&T Opposition at 1-6; Ad Hoc Opposition at 15-18; Bankers Coalition Opposition at 14-15. Ad Hoc dismisses Armour Packing as a procedural decision, while disputing CompTel's characterization of MCI v. FCC as a procedural decision.

[17] AT&T Opposition at 5, citing AT&T Communications, Revisions to Tariff F.C.C. No. 12, No. 87-568, CC Docket No. 87-568, FCC 91-333, released November 22, 1991, para. 76.

(c) Discussion

9. We now affirm our finding in the Interexchange Order that our contract carriage policy is consistent with the Communications Act. We reject claims by CompTel that our contract carriage policy violates sections 202(a) and 203 of the Act.

10. CompTel argues that section 202(a) of the Act was designed to prevent a dominant carrier from negotiating individual deals. It claims that contract carriage, by promoting individualized deals, violates this provision of the Act. This argument was rejected in the Interexchange Order. There we found that individually negotiated contracts could satisfy the nondiscrimination provisions of the Act if the terms of the contract were made generally available to similarly situated customers. This finding was based largely on Sea-Land Service, Inc. v. ICC[18] and MCI v. FCC.[19] In Sea-Land, the court, in interpreting analogous nondiscrimination provisions of the Interstate Commerce Act, stated that "[a]lthough one normally regards contract relationships as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms."[20] Similarly, in MCI v. FCC, the court relied on Sea-Land in rejecting an argument that the substantive nondiscrimination provisions of the Communications Act preclude the filing of generally available tariffs based upon contract.[21]

11. CompTel argues that our reliance on MCI v. FCC is misplaced, claiming that this case holds only that there is no procedural bar in the Act against filing contract-based tariffs. We reject CompTel's narrow reading of this case. The court's discussion of contract-based rates in the Tariff 12 context,

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[18] 738 F.2d 1311.

[19] 917 F.2d 30 (D.C. Cir. 1990).

[20] Id. at 1317. As Ad Hoc notes, Sea-Land also rejected CompTel's reading of Armour Packing, stating, "we find the inference unjustified that the Supreme Court in Armour Packing intended to condemn contract rates as inherently discriminatory." Sea-Land, 738 F.2d at 1317. See Ad Hoc Opposition at 16-17.

[21] MCI v. FCC, 917 F.2d at 38 ("[u]nder Sea-Land, then, rates arrived at through negotiations between a carrier and an individual customer and then made generally available to similarly situated customers do not per se violate the Communications Act if the rates are filed with the FCC"). See also Competitive Telecommunications Association v. FCC, 998 F.2d 1058 (D.C. Cir. 1993).

including its description of and reliance on the Sea-Land decision (which is largely ignored by CompTel), clearly addresses whether the substantive nondiscrimination requirements of the Communications Act preclude contract-based rates.[22] This part of the court's opinion did not respond to procedural arguments involving the filing of contract-based rates. Thus, as a substantive matter, it is now well-established that contract-based tariffs are not inherently unlawful.

12. CompTel argues also that our general availability requirement with respect to contract-based tariffs is not enough to satisfy section 202 of the Act. Citing American Trucking Ass'n v. FCC[23], it claims that contract-based tariffs are inherently unlawful even if they are generally available to similarly situated customers.[24] We recognize that general availability does not by itself ensure compliance with section 202(a). At the same time, however, when a generally available rate is justified by competitive circumstances or costs, for example, we retain the discretion to find that rate lawful.[25] We have noted in both the Competitive Carrier proceeding and the Interexchange Order that carriers lacking market power are presumptively unable to engage in unreasonable discrimination.[26] Based on this presumption, we have concluded that generally available contract rates for services subject to substantial competition are not likely to be unreasonably discriminatory.[27] We have not held that, absent a justification based on competitive circumstances or costs, general availability by itself assures compliance with the Act.

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[22] See MCI v. FCC, 917 F.2d at 37-38.

[23] 377 F.2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 942 (1967) ("American Trucking"). CompTel also cites Armour Packing in support of this argument. As noted, Sea-Land rejected CompTel's reading of that case. See note 20, supra.

[24] In American Trucking, the court upheld an FCC determination that a particular AT&T tariff was unlawfully discriminatory even though that tariff was generally available.

[25] See 377 F.2d at 131.

[26] See Policies and Rules concerning Rates for Competitive Common Carrier Services and Facilities Therefor, First Report and Order, 85 FCC 2d. 1, 21 and 31(1980); Interexchange Order, 6 FCC Rcd at 5903.

[27] We stated that in the event a complainant shows that a contract rate is discriminatory, we will consider whether such discrimination is reasonable based on such factors as competitive circumstances and cost differences. 6 FCC Rcd at 5903, n. 216.

13. CompTel argues further that the absence of cost support requirements for AT&T's contract-based tariffs makes it impossible to determine whether contract-based tariff prices cover the costs of providing service or are being set at predatory levels. CompTel, however, does not present any facts or arguments in its petition that were not considered and rejected previously. In the Interexchange Order we found that given the level of competition for business services, traditional regulation of AT&T -- including cost support requirements -- imposed heavy costs on both carriers and users, while producing few, if any benefits.[28] We also rejected arguments that contract carriage would lead to predatory pricing. Indeed, we concluded that contract carriage actually reduced the likelihood of predation. Moreover, we stated that we would be able to detect any predatory behavior if it occurred.[29] CompTel offers no arguments or evidence that convince us these conclusions were wrong, and we reject its argument that the absence of cost support requirements renders our contract carriage policy illegal.

14. CompTel also challenges the presumption of lawfulness accorded AT&T's contract-based tariffs, arguing that this presumption is inconsistent with previous Commission statements on AT&T private line discounts and individual case basis (ICB) pricing of local exchange carriers DS3 circuits. These statements, however, have little relevance to contract-based tariffs because they were made about services that were not found to have been subject to substantial competition. Indeed, the language on private line volume discounts cited by CompTel appears in a Notice of Inquiry and Proposed Rulemaking issued before divestiture. In the Report and Order that followed, the Commission specifically noted that increased competition might "assure reasonable rate

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[28] See Interexchange Order, 6 FCC Rcd at 5895. Indeed, prior to the Interexchange Order, in the Price Cap Order, we eliminated cost support requirements for virtually all of AT&T's tariff filings. See Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket 87-313, 4 FCC Rcd 2873 (1989).

CompTel also relies upon the absence of a cost support requirement for contract carriage to distinguish MCI v. FCC. We find nothing in that decision, however, to suggest that the lawfulness of individually negotiated offerings in any way depends upon the filing of cost support information. Indeed, the court recently affirmed a Commission order finding Tariff 12 options lawful, even though we no longer require cost support information to be filed with Tariff 12 options. CompTel v. FCC, 998 F.2d 1058.

[29] Interexchange Order, 6 FCC Rcd at 5900.

structures and rate levels, making regulatory review unnecessary."[30] Similarly, the Commission has never found local exchange carrier DS3 circuits subject to substantial competition. Moreover, the DS3 ICB rates at issue were not generally available to similarly situated customers. In contrast to these offerings, AT&T's contract-based tariffs must be generally available to similarly situated customers, and they may only include services subject to substantial competition.

15. With respect to section 203 of the Act, CompTel states that users must be able to determine from the tariff itself all rates, terms and conditions for each service provided pursuant to the tariff, and that AT&T should be required to file the contract underlying a contract-based tariff. The Interexchange Order specified the information that must be included in contract-based tariff filings by AT&T.[31] We find now, as we did then, that this information includes all of the rates, terms and conditions required under Section 203 of the Act. Therefore, we affirm that there is no need to require AT&T to file its contracts or any additional information.[32]

16. Finally, CompTel argues that if contract carriage is retained, we should adopt certain safeguards designed to prevent

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[30] Private Line Rate Structure and Volume Discount Prices, Report and Order, CC Docket No. 79-246, 97 FCC 2d 923, 925-926 (1984).

[31] We required that contract-based tariffs contain the following information:

> (1) the term of the contract, including any renewal options; (2) a brief description of each of the services provided under the contract; (3) minimum volume commitments for each service; (4) the contract price for each service or services at the volume levels committed to by the customers; (5) a general description of any volume discounts built into the contract rate structure; and (6) a general description of other classifications, practices, and regulations affecting the contract rate. 6 FCC Rcd at 5902.

[32] Nor do we find it necessary, given the level of competition in the marketplace, to prohibit AT&T in all circumstances from denying service to a customer based on the customer's refusal to accept terms not in the contract-based tariff. These matters are best considered on a case-by-case basis. See Interexchange Order, 6 FCC Rcd at 5903.

AT&T from engaging in anticompetitive conduct.[33] We are not convinced that such additional safeguards are necessary. AT&T may include in its contract-based tariffs only those services that are subject to further streamlined regulation. These are services that we have determined are subject to substantial competition and for which AT&T lacks market power. As such, these services are not likely to be provided in an anticompetitive manner, whether as part of a contract-based tariff, or otherwise. Moreover, in the event that AT&T does attempt to engage in anticompetitive conduct in its provision of contract-based services, existing safeguards and remedies should suffice to protect the public interest.[34]

(2) Alteration of Contract-based Tariffs

(a) Background/Petitions

17. In the Interexchange Order, the Commission noted that tariff revisions that alter material terms and conditions of a long-term contract may be unjust and unreasonable unless the carrier can show substantial cause for the change.[35] The Commission stated, however, that it could not otherwise prevent carriers from altering carrier-customer contracts with inconsistent tariff filings.[36]

18. The Broadcast Coalition and Ad Hoc ask us to clarify that contract carriage will enable customers to rely more fully on the mutual enforceability of their individually negotiated

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[33] In addition to the safeguards discussed in the previous paragraph, CompTel proposes that we require AT&T to: (1) use consistently defined terms, conditions and rate structures; (2) use the same consistent integrated structure, terminology, and level of detail; (3) specify eligibility criteria; and (4) specify that use of AT&T equipment is not a prerequisite for network services.

[34] We note, for example, that we recently issued a Notice of Apparent Liability for Forfeiture against AT&T for apparently failing to provide service under one of its contract-based tariffs to three resellers of interstate services, in violation of section 201(a) of the Act. See AT&T Communications Apparent Liability for Forfeiture and Order to Show Cause, FCC 94-359, released January 4, 1995.

[35] Id. 6 FCC Rcd at 5898, n. 155, citing RCA American Communications Inc., 84 FCC 2d 353, 358 (1980) ("Investigation Order"); 86 FCC 2d 1197, 1201 (1981) ("Rejection Order"); 2 FCC Rcd 236 (1987) ("Reconsideration Order") (RCA Americom Decisions).

[36] Id. citing American Broadcasting Companies, Inc. v. FCC, 643 F. 2d 818 (D.C. Cir. 1980).

agreements. The Broadcast Coalition notes that the Commission has recognized that unilateral changes by a carrier in negotiated service arrangements may be considered unjust and unreasonable absent substantial cause for the changes. It argues that in the context of contract carriage, customers ought to have heightened expectations of the mutual enforceability of their agreements. The Broadcast Coalition asks us to clarify that a tariff that abrogates the terms of a contract-based tariff is unjust and unreasonable "absent extraordinary circumstances directly affecting the public interest."

19. Ad Hoc argues that the benefits of contract carriage depend centrally on the proposition that the service arrangements, rates, terms and conditions negotiated with such difficulty and cost will be in force for the full term of the contract.[37] To this end, it suggests that the Commission apply traditional contract law principles, such as impracticability, impossibility of performance, frustration of purpose, or failure of presupposed conditions, in determining whether there is substantial cause for a unilateral change to a contract-based tariff.[38] Ad Hoc argues that these principles would appropriately balance the reliance interest of customers with carriers' interest in protecting themselves against extraordinary and unforeseeable changes in circumstance.[39] Ad Hoc also asks us to hold that customers may terminate their contract without liability in the event AT&T shows substantial cause for a material change in such contracts. Ad Hoc argues that it would be patently unfair to force customers to continue purchasing service under terms they never agreed to.[40]

20. Ad Hoc also proposes certain procedural rules for unilateral modifications to a contract-based tariff. It asks us to require AT&T to flag all such modifications in its tariff filings and to set forth in detail the claimed justification for them. In

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[37] As evidence of the cost to users of executing a new telecommunications contract, Ad Hoc describes thirteen steps that typically attend the contract process. See Ad Hoc Petition at 15-16.

[38] Ad Hoc states that the Commission need not adopt every detail of these doctrines but, rather, can leave details of their application to individual cases. It asks us, though, to clearly state that these principles will govern the application of the substantial cause test. Id. at 19-20.

[39] Ad Hoc asks us to clarify that the substantial cause test applies just as strongly to the contracts of AT&T's competitors as it does to those of AT&T. Id. at 20.

[40] Id. at note 11.

addition, it argues that all such filings should be automatically suspended and investigated. It also asks that we clarify that the substantial cause test applies not only to tariffs that unilaterally modify a contract but also to complaints alleging that such tariffs are unjust and unreasonable.[41]

(b) Positions of the Parties

21. API agrees with the Broadcast Coalition and Ad Hoc that the Commission should recognize the mutual enforceability of contract carriage arrangements. It specifically supports the standard and procedures proposed by Ad Hoc. The Bankers Coalition suggests that the Commission require carriers to include in all contract-based tariffs the provisions that currently appear in Section 7.2.17.A.1 and .2 of AT&T's Tariff 12 General Regulations. Those provisions permit a customer to terminate service without liability if AT&T increases the rates or otherwise materially impairs the customer's ability to use the service. According to the Bankers Coalition, these provisions adequately balance the interest of customers and carriers.

22. While AT&T does not seek relief from the substantial cause test, it opposes the Broadcast Coalition and Ad Hoc petitions insofar as they seek changes in that test. AT&T argues that the substantial cause test was adopted by the Commission to recognize and protect the same reliance interests asserted by petitioners here and affords customers the maximum protection to which they are entitled under the Act. It argues that the standard proposed by Ad Hoc, which incorporates traditional contract law principles, is inappropriate since contract-based tariffs, unlike other commercial contracts, are subject to regulation under the Act. It argues further that this issue is, as a practical matter, largely irrelevant because the intense competition in the market precludes any opportunity or incentive for carriers to alienate their customers by changing their contract-based tariffs without consent.

(c) Discussion

23. It is a well-established principle that when a filed tariff rate differs from a rate set in a carrier-customer contract, the tariff rate is the legal rate.[42] Likewise, if a carrier

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[41] Id. at 14. Ad Hoc asserts that in any such complaint proceeding the burden should be on complainant to demonstrate that the tariff filing in question materially modifies a contract. It argues that if the complainant meets that burden, the burden of demonstrating substantial cause should shift to the carrier.

[42] See, e.g., American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980).

initiates a unilateral rate change altering a contract rate by filing a tariff revision, the new filed rate becomes the legal rate unless the revised rates are found to be unjust or unreasonable under section 201(b) of the Act or otherwise unlawful.[43] In the RCA Americom Decisions, we recognized that a dominant carrier's proposal "to modify extensively a long term service tariff may present significant issues of reasonableness under Section 201(b) that are not ordinarily raised in other tariff filings."[44] Accordingly, we held that a dominant carrier's tariff revisions altering material terms and conditions of a long-term service tariff will be considered reasonable only if the carrier can make a showing of substantial cause for the revisions.[45] In the Interexchange Order, we cited the RCA Americom Decisions as holding that the "substantial cause" test applies to tariff revisions that alter material terms and conditions of a long-term contract.[46] We now affirm the applicability of the substantial cause test and provide the following elaboration.

24. At the outset, we note that contract carriage serves the public interest by enabling users to purchase services that match their needs in particular ways and by facilitating user and interexchange carrier planning by increasing the availability of long-term commitments and price protection. Given the substantial competition that exists for the services in contract-based tariffs, there should be few incidents, if any, of unilateral, material tariff revisions to a contract deal. If a carrier attempts making such changes, it risks losing the future business of the affected customers and damaging its own reputation in the marketplace. Thus, it is not clear that, as a practical matter, a carrier would ever seek to make such unilateral material changes to contract-based tariffs. Nevertheless, we provide the following elaboration of how we intend to apply the substantial cause test in the unlikely event that a carrier seeks to make a unilateral change in a contract-based tariff.[47]

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[43] See 47 U.S.C. § 201(b).

[44] 84 FCC 2d at 358.

[45] 86 FCC 2d at 1201-1202. See also Interexchange Order, 6 FCC Rcd at 5898, n.155.

[46] Interexchange Order, 6 FCC Rcd at 5898, n.155.

[47] In light of this elaboration, we do not deem it necessary to replace the substantial cause test with a stricter test as advocated by the Bankers Coalition. For the same reasons, we do not deem it necessary to adopt the procedural rules for unilateral contract-based tariff modifications proposed by Ad Hoc.

25. In applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and IXCs through greater availability of long-term commitments and price protection.[48] This benefit would be reduced if AT&T was unilaterally able to alter material terms of their contracts. Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assessment of whether a contract-based tariff revision is just and reasonable under the substantial cause test. We are not prepared, however, to say at this time that these principles provide definitive parameters for a substantial cause showing.[49] Instead, we will consider on a case-by-case basis in light of all relevant circumstances whether a substantial cause showing has been made.[50] In the unlikely event that a material change to a contract-based tariff meets the substantial cause test, we will also consider on a case-by-case basis whether to permit customers taking service under that contract-based tariff to terminate their contract.[51]

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[48] Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2642 (1990).

[49] Application of the substantial cause test depends upon the equities of the particular situation. See Investigation Order, 86 FCC 2d at 1201-1202.

[50] Since the substantial cause test is the framework by which we determine whether material changes to a contract-based tariff are just and reasonable, we have decided to apply the test not only to initial review of AT&T's tariffs but also to any post-effective tariff review and to complaints as well.

[51] Ad Hoc also asks us to clarify that the substantial cause test applies to the contract-based tariffs of nondominant carriers. We recently held in the Nondominant Carrier Tariff Order that advance scrutiny of the interstate tariffs of nondominant carriers is unnecessary. Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order, CC Docket No. 93-36, FCC 93-401 (released August 18, 1993), at paras. 21-26, 58 Fed.Reg. 44457 (August 23, 1993). Nevertheless, we clarify that in the unlikely event of a unilateral tariff modification by a nondominant carrier, we will apply the substantial cause test as described above in any post-effective tariff review or in a complaint proceeding. We would also consider on a case-by-case basis whether to allow customers to terminate the contract without liability.

B. Rules Governing AT&T's Provision of CPE and Enhanced Services

(1) CPE and Customized Network Services

(a) Background/Petitions

26. In the Interexchange Order, the Commission retained the CPE bundling restrictions established in Computer II.[52] The Commission concluded that the risk of an adverse effect upon competition in the CPE marketplace or reduced consumer choice resulting from a change in these rules outweighed the potential benefits from changing the rules.

27. Parties do not ask us to reconsider this decision. However, IDCMA requests that we impose certain safeguards to assure that AT&T's provision of "customized" services, such as Tariff 12 and contract services, does not impede competition in the CPE marketplace. IDCMA asserts that many customers demand integrated service/equipment packages and that in order to offer such packages, CPE vendors must have access to the terms and conditions under which network services are available in the marketplace.[53] It maintains that while generic tariff terms are readily available, independent CPE vendors have no way of knowing what kind of negotiated package AT&T might make available to a prospective customer. It asserts that AT&T's own CPE personnel have unique access to this information and thereby have an advantage in the systems integration marketplace.

28. IDCMA proposes to remedy this alleged inequity with safeguards that it claims will provide effective access to custom services to independent CPE vendors. First, it proposes that AT&T be required to notify Tariff 12 and contract customers, orally and in writing, that their Tariff 12 or contract rate is not contingent on their purchase of AT&T CPE or any other AT&T nonregulated service.[54] Second, it proposes that AT&T be required to implement an improved vendor liaison program which would handle requests for Tariff 12 and contract service price quotes based on the network designs created by independent CPE vendors or systems integrators. Third, it proposes that AT&T be required to make available to

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[52] Amendment of §64.702 of the Commission's Rules and Regulation, 77 FCC 2d 384, 388 (1980).

[53] IDCMA Petition at 4-6.

[54] CompTel similarly asks us to require AT&T to state in its contract tariffs that the use of AT&T equipment is not a prerequisite for qualification for AT&T network service. See CompTel Petition at 18.

unaffiliated CPE vendors the same collocation opportunities afforded to affiliated vendors.

(b) Positions of the Parties

29. AT&T opposes the safeguards recommended by IDCMA and argues that they have been previously rejected by the Commission and the Court in MCI v. FCC.[55] AT&T denies that it includes CPE in its Tariff 12 offerings and states that we have recognized this in the Tariff 12 Reconsideration Order.[56]

30. Ad Hoc questions the need for IDCMA's proposals. It asserts that large customers are generally aware of the CPE bundling restrictions and would not appear to need the additional disclosure sought by IDCMA. It asserts further that generalized allegations of competitive harm without corroborating evidence would not ordinarily justify remedial action. Nevertheless, finding IDCMA's proposals to be minimally burdensome, Ad Hoc states that it would not oppose further consideration of these proposals, subject to one caveat: that the enhanced Vendor Liaison program be considered as the basis for additional customer choice and not any limitation on customers' ability to deal with AT&T directly.[57]

(c)Discussion

31. We are not persuaded that the proposed safeguards are necessary. First, neither IDCMA nor CompTel demonstrates either that customers seeking customized service packages are unaware of our CPE bundling rules or that AT&T seeks to bundle equipment in the contracts underlying its Tariff 12s and contract-based tariffs. Indeed, Ad Hoc maintains that customers of these services are generally aware of the CPE bundling restrictions. Second, neither IDCMA nor any other party demonstrates that systems integrators have been denied effective access to customized service arrangements. In the absence of such evidence, we will not require AT&T to adopt the vendor liaison program IDCMA advocates.[58]

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[55] AT&T Opposition at 6, citing MCI v. FCC, 917 F.2d at 42, n.14.

[56] AT&T Communications Tariff FCC No. 12, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 7928, 7930-31 and n.20 (1989).

[57] Ad Hoc Opposition at 20-22.

[58] We note that in a competitive market, such as the market for customized service offerings, all carriers, including AT&T, have incentives to offer prospective customers and their representatives the best deal possible. While IDCMA offers

(2) Comparably Efficient Interconnection (CEI) Requirements

(a) Background/Petitions

32. In the Interexchange Order, we eliminated the CEI requirements for AT&T's provision of enhanced services that rely exclusively on basic services subject to further streamlined regulation, but did not eliminate the CEI requirements applicable to further streamlined services when both further streamlined and nonstreamlined services are used to provide enhanced services. We declined to remove the requirements for enhanced services using non-streamlined network components, noting that we preferred to proceed incrementally, starting first with the services for which CEI requirements are clearly unnecessary.[59]

33. Citicorp and AT&T seek reconsideration of this decision, albeit to opposite ends. Citicorp maintains that neither the record nor the Interexchange Order provides any sustainable basis for eliminating the CEI parameters.[60] It denies that CEI imposes substantial costs on AT&T and claims that the Order addresses only one CEI parameter -- the requirement that AT&T provide competitors a standardized interface.[61]

34. Citicorp also denies that the growth of competition in the interexchange marketplace justifies the elimination of CEI.[62] It argues that independent enhanced service providers cannot obtain from any carrier the kind of preferential network access AT&T can provide its own enhanced service operations and that, in any case,

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generalized assertions that systems integrators have been denied effective access to AT&T's customized service offerings, it does not offer specific evidence of this occurring, nor does it demonstrate any specific adverse effect on competition in the CPE marketplace.

[59] Interexchange Order at 5910, para. 184.

[60] According to Citicorp, many CEI parameters have been FCC policy for decades. It claims that neither the abbreviated discussion of CEI in the Interexchange Order nor the meager record that was offered on this issue provides an adequate basis for departing from longstanding policy.

[61] Citicorp Petition at 5-7.

[62] Citicorp Petition at 10. It asserts that since enhanced service traffic constitutes only an insignificant portion of total interstate traffic, little of AT&T's revenues would be at risk if it engaged in anticompetitive abuse to support its entry into a given enhanced service.

the costs of switching to another carrier are high. It also maintains that other interexchange carriers will not provide enhanced service providers with an environment free from anticompetitive abuse.[63] Finally, it argues that CEI remains a valuable tool for promoting efficient access to the basic network by independent enhanced service providers.[64]

35. Citicorp denies that requiring AT&T to obtain approval of a CEI plan prior to offering a new enhanced service is burdensome.[65] It argues that, even if true, these concerns could be addressed by requiring AT&T to file CEI plans contemporaneous with its introduction of an enhanced service. Such reports, it asserts, would enable other enhanced service providers to determine whether they are afforded the same access to AT&T's network as AT&T's enhanced service operations.

36. AT&T, on the other hand, argues that we did not go far enough in lifting CEI requirements. Specifically, it questions our decision to retain CEI requirements for streamlined services that are coupled with nonstreamlined services in providing enhanced services. AT&T maintains that regardless of whether a streamlined service is used alone or with a nonstreamlined service, the CEI requirements should not apply.[66]

37. AT&T also opposes Citicorp's petition for reimposition of CEI parameters and filing requirements. It asserts that the growth of competition in streamlined services has eliminated the predicate for these requirements.[67] It also challenges Citicorp's contention that the costs of CEI are trivial and not adequately specified in the record. It states that the substantial efficiencies resulting from technical and functional

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[63] Citicorp argues that in regulating the conduct of AT&T, the CEI rules create "a behavioral umbrella" that constrains the conduct of AT&T's competitors as well.

[64] Citicorp Reply at 6-7.

[65] Citicorp Petition at 14-15.

[66] AT&T Petition at 20-22.

[67] AT&T asserts that at the time these requirements were adopted, the Commission stated that they would no longer be needed when competition had grown sufficiently. AT&T Opposition at 20, note **, citing Computer III Phase I Order, 104 FCC2d 958 at 1021, n. 175; Computer III Phase I Reconsideration, 2 FCC Rcd 3035 at 3042. Citicorp contends that the Commission indicated only that "some or all" of the requirements may no longer apply if AT&T lost market share. Citicorp Reply at note 10.

integration of enhanced and basic services are lost by the costly re-engineering required to create an interface that meets CEI requirements. It maintains that it has been unable, because of these efficiency losses, to offer any integrated enhanced services under the CEI parameters. It denies that the elimination of CEI was predicated on one parameter only, maintaining that efficiency losses result from the interface functionality parameters, unbundling requirements, technical characteristics, and end-user access parameters.[68]

(b) Discussion

38. We now modify our decision in the Interexchange Order and relieve AT&T of CEI requirements for any streamlined service. In lifting CEI requirements for enhanced services relying exclusively on services subject to further streamlining, we reasoned that, because streamlined services are subject to substantial competition, CEI requirements are not necessary to ensure that AT&T provides nondiscriminatory access to these services. We also noted that CEI filing requirements and CEI parameters impose substantial costs.[69] This would appear to be the case, however, regardless of whether a particular streamlined service is used in conjunction with a nonstreamlined service in the provision of an enhanced service. In either case, the need for CEI requirements in connection with the streamlined service is obviated by the existence of substantial competition for that service. Thus, the distinction we made in the Interexchange Order between streamlined services that are coupled with nonstreamlined services, and those that are not, has no valid basis and should be abandoned. Consistent with this conclusion, we decide that for any enhanced service that AT&T proposes to provide that relies on both streamlined and nonstreamlined services, AT&T must file a CEI plan describing how AT&T is complying with the CEI parameters for the nonstreamlined services only.

39. We reject Citicorp's request that we reimpose CEI requirements on streamlined services or that we substitute a modified CEI plan requirement. We remain convinced that such requirements are no longer necessary in today's market environment in light of the substantial competition that we have found to exist for these services. As we stated in the Interexchange Order, this competition will ensure that enhanced service providers will be able to procure these services subject to further streamlining on favorable terms, either from AT&T or another carrier. The development of substantial competition in this market since our adoption of CEI requirements is a significant changed circumstance

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[68] AT&T Opposition at 22, note ****.

[69] Id.

that supports modification of our prior policy, particularly when viewed in light of the substantial costs imposed by the CEI parameters that we identified in the Interexchange Order.[70] For these reasons, we decline to impose even the less burdensome reporting requirements proposed by Citicorp.

40. We note further that Citicorp's petition seems to assume that in eliminating CEI parameters for streamlined services, we also relieved AT&T of all our Computer II requirements. This is not the case.[71] The other Computer II requirements, which apply to all carriers offering enhanced services that own their own common carrier transmission facilities, were not affected by the Interexchange Order. Thus AT&T (and other carriers) must continue to unbundle basic and enhanced services and they must offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.[72]

41. We also deny Citicorp's request that we reimpose installation and maintenance reporting requirements for streamlined services. In the Interexchange Order, we found such requirements to be no longer necessary in light of the substantial competition for streamlined services. We noted that these requirements were originally imposed because of the Commission's concern that AT&T would use its market power in the provision of network services to compete unfairly in other markets. We found that in today's business services marketplace, AT&T cannot discriminate against particular customers unless it is prepared to lose those customers to other IXCs. Citicorp has provided no evidence to convince us that these conclusions were erroneous. Indeed, in the years we were receiving these reports, not a single complaint was filed alleging that AT&T unlawfully discriminated in its provision of installation and maintenance service. Absent a demonstrated need for these requirements, we will not reimpose them.

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[70] See Interexchange Order, 6 FCC Rcd at 5910.

[71] While Citicorp argues that eliminating CEI rules represents a departure from longstanding Commission policies, we note that many of the policies Citicorp cites still apply. In addition, as AT&T observes, the Computer III decision specifically stated that some of the requirements established there would no longer be necessary in the event we found that AT&T lacked market power in the affected services. See note 61, supra.

[72] See Second Computer Inquiry, Final Decision, 77 FCC 2d at 475. We note also that section 202 of the Act prohibits AT&T from discriminating unreasonably in its provision of basic services.

C. Regulatory Treatment of Other Services

(1) Basket 1 Services

(a) Background/Petitions

42. In the Interexchange Order, the Commission retained price cap regulation of Basket 1 services, including operator services, IMTS, and residential and small business services. In addition, the Commission precluded AT&T from including Basket 1 services in contract-based tariffs.[73]

43. CompTel and Sprint request that we clarify that AT&T is also precluded from including international, operator-assisted, and analog private line services in Tariff 12.[74] They argue that the Commission's rationale for prohibiting future bundling of inbound services in Tariff 12 options -- AT&T's ability to leverage market power -- is equally applicable to other nonstreamlined services.[75] They note that the Commission has prohibited AT&T from including nonstreamlined services in contract-based tariffs and claim that similar restrictions should apply to Tariff 12s.

44. Ad Hoc opposes a ban on the inclusion of international, MTS, operator assisted, or analog private line in Tariff 12 offerings.[76] Ad Hoc claims that parties have not made any showing that leveraging of these services occurs or could occur.[77]

45. AT&T argues that the Tariff 12 restrictions proposed by CompTel and Sprint are foreclosed by the Administrative Procedure Act.[78] AT&T argues further that since Tariff 12 is not like a combination of individual tariffed services, findings about individual services in the Interexchange Order do not necessarily apply to Tariff 12 offerings.[79] AT&T also argues that our bundling restrictions with respect to 800 and inbound services were based solely on the lack of 800 number portability, a consideration that

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[73] Interexchange Order, 6 FCC Rcd at 5908.

[74] CompTel Petition at iii.

[75] CompTel Petition at 23-24; Sprint Petition at 10.

[76] Ad Hoc Opposition at 3.

[77] Id. at 10

[78] AT&T Opposition at 10.

[79] AT&T Opposition at 15 citing Tariff 12 Remand Order, paras. 14, 27-28, 32, 37, 43.

does not apply to other services. AT&T notes that, contrary to Sprint's claim, the Commission did not find that AT&T had "substantial market power" in analog private line, IMTS, and operator services -- only that analog services may be less subject to competitive pressures than other business services and that the record did not support streamlining of IMTS and operator services. AT&T agrees with Ad Hoc that the Commission should not restrict customer flexibility in obtaining integrated service arrangements from AT&T.[80]

(c) Discussion

46. We deny the requests of CompTel and Sprint that we prohibit AT&T from including nonstreamlined services in its Tariff 12 options. We first note that these requests ignore the nature of Tariff 12, in particular, that a Tariff 12 option is not merely the sum of its individual components.[81] We also reject arguments that the rationale underlying our bundling restrictions for 800 and inbound services also applies to nonstreamlined services. We turn, first, to this argument.

47. CompTel and Sprint argue that, as was the case with 800 service, AT&T has the ability to leverage market power in nonstreamlined services to gain an advantage in the provision of more competitive services. We do not believe that they have demonstrated this to be true. In the Interexchange Order, we affirmatively found that AT&T maintained a market advantage in the provision of 800 services due to the lack of 800 number portability.[82] We found further that AT&T had a unique ability to leverage its market power over "captive" 800 subscribers by bundling 800 service with other services.[83] These findings were the basis of our policy prohibiting AT&T from including 800 and inbound services in future contract-based tariffs or Tariff 12s pending 800 number portability.[84]

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[80] AT&T Opposition at 15 citing Ad Hoc Petition at 11.

[81] See CompTel v. FCC, 998 F.2d at 1061-1063.

[82] Prior to May 1, 1993, a customer could not change its 800 service provider without also changing its 800 number.

[83] We noted that customers with substantial costs of changing 800 numbers -- so called "captive" customers -- were particularly susceptible to being leveraged by AT&T.

[84] This 800 bundling prohibition was modified in an earlier reconsideration order. Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677 (1992).

48. Contrary to the assertions of CompTel and Sprint, no such findings were made with respect to Basket 1 and analog private line services. In the case of Basket 1 services, we declined to apply further streamlined regulation not because of any affirmative finding that competition was lacking in the provision of these services, but because of our inability to conclude, based on the record, that they were fully competitive.[85] In addition, we noted our desire to proceed with an extra measure of caution in considering reduced regulation of services used by residential and small business customers. As for analog private line services, we found that these services suffered from diminishing demand and were less subject to competition than other Basket 3 services.[86] We did not find, however, that analog private line customers were "captive" in the sense that 800 service subscribers were. Nor did we find that AT&T could adversely affect competition in the interexchange marketplace generally by bundling analog private line services with other services. Given these differences in the findings made with respect to 800 services and other nonstreamlined services, we did not extend the policies adopted for 800 and inbound services to Basket 1 and analog private line services. Neither CompTel nor Sprint has provided any new evidence or otherwise given us any reason to reassess this approach.

49. CompTel and Sprint argue further that it is irrational to prohibit AT&T from including nonstreamlined services in contract-based tariffs but allow their inclusion in Tariff 12s. At the outset, we note that our contract carriage policy is a new policy and we have the discretion to proceed cautiously and incrementally to ensure that the public interest is protected. Thus, the fact that we have authorized AT&T to offer contract rates only for certain services does not mean that similar limitations must or should apply outside the contract carriage context. More significantly, unlike contract-based tariffs, which may consist of one or more "piece-part" offerings, Tariff 12 components are not "like" individual nonstreamlined services.[87] Rather, Tariff 12s are bundled service packages that are provided primarily, if not exclusively, to large users. Thus, all components of a Tariff 12

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[85] In July 1993, we adopted a Notice of Proposed Rulemaking in which we proposed to remove optional calling plans (OCPs) from price cap Basket 1 on the ground that such services were subject to substantial competition. Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, 8 FCC Rcd 5205 (1993). This proposal would not affect the treatment of operator services or IMTS.

[86] Interexchange Order, 6 FCC Rcd at 5892-5893.

[87] See, e.g., CompTel v. FCC, 998 F.2d at 1061 (services not found to be like may not be compared with one another for purposes of analysis under the nondiscrimination provisions of the Act).

service are offered in the context of an overall business service package that is subject to substantial competition. The same would not necessarily be true if the Commission permitted nonstreamlined services in contract-based tariffs. In the latter circumstance, AT&T would be able to offer contract rates even for relatively small usages of stand-alone services. Such offerings would raise issues not raised by Tariff 12 packages. Finally, CompTel and Sprint ignore that some large business services that have been streamlined contain operator and international components. To the extent a streamlined service includes such functionalities, these functionalities may be included in a contract-based tariff. Thus, CompTel and Sprint are incorrect when they argue that no operator or international functionalities may be part of a contract-based tariff.

(2) Basket 3 Services - Private Line Services

a. Background/Petitions

50. In the Interexchange Order, we found that further streamlining of AT&T's analog private line service would not be in the public interest. This decision was based on a finding that analog private line services were of diminishing importance and therefore less subject to competition than other business services. We were concerned that removing price cap regulation of these services could lead to higher prices. Accordingly we retained price cap regulation for analog private line services. Because all other Basket 3 services were removed from price cap regulation, however, we eliminated service bands from Basket 3.[88] Services provided under AT&T Tariff No. 11, which had not previously been subject to price cap regulation, were kept outside of price caps and made subject to further streamlined regulation.[89]

51. At the same time, we concluded that the marketplace for digital private line services was substantially competitive.[90] Accordingly, we decided to apply further streamlined regulation to

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[88] 6 FCC Rcd at 5895-5896. Analog private line services remaining in Basket 3 include: voice grade private line; analog multipoint service, terrestrial television transmission service and analog private line services offered under contract to government entities.

[89] See 6 FCC Rcd 5914, Appendix B (rules changes to Section 61.42 indicate that AT&T Tariff No. 11 remains outside of Basket 3 and is subject to further streamlined regulation). Tariff 11 services include, inter alia, AT&T's resale of local exchange company access channels and the access coordination function.

[90] 6 FCC Rcd at 5892.

these services.[91] This decision was based on the demand elasticity of digital private line service users, on the existence of excess supply capacity of AT&T's competitors, and on AT&T's pricing digital private line services consistently below the upper service rate band. In reaching this conclusion, we refuted a claim by IDCMA, that AT&T had a digital private line market share of 88%, based on the results of a 1989 market survey.[92]

52. Ad Hoc and ARINC petition us to clarify or reconsider the Interexchange Order to specify the rate elements that we intended to remain subject to price cap regulation. AT&T, they claim, interprets the term "analog private line service" as applying only to analog services that accompany analog interoffice circuits. They argue that AT&T has continued to raise rates for analog private line service by unilaterally changing the interoffice circuits used by analog private line customers over to digital circuits and by raising the rates for various services AT&T offers to customers in conjunction with these circuits. They argue that these services, although associated with a digital interoffice circuit, should be treated as "analog private line service," because the customer has no say in AT&T's decision to replace the analog interoffice circuits with digital, and because if the Commission treats these services as digital, AT&T will be able to circumvent the Interexchange Order and raise the rates paid by analog private line users without price cap control.[93] Both Ad Hoc and ARINC argue that no effective competition for analog private line services exist, and that, to the extent other suppliers do exist, it is uneconomical for them to switch carriers or to transition all of their analog equipment over to digital.[94]

53. ARINC also argues that we should establish service bands within Basket 3 to prevent cross-subsidization by AT&T. It claims that AT&T's 500% increase in its Analog Multipoint Charge -- a Basket 3 service -- subsidized corresponding rate decreases for

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[91] Id. at 5893-5894.

[92] Id. at 5892.

[93] Ad Hoc Petition at 23-25; ARINC Petition at 1-7.

[94] Ad Hoc Petition at 22-23; ARINC Petition at 7. ARINC argues that while competitors offer services equivalent to those of AT&T, none have the extensive network presence of AT&T. As a result, local access costs to the points of presence (POP) of competitive carriers would be higher than to those to reach AT&T POPs. Ex parte letter from Robert J. Butler, Counsel for ARINC, to Cheryl A. Tritt, Chief, Common Carrier, Bureau, FCC, September 24, 1992.

other Basket 3 services. It states that we should establish 5% service band requirements for each element in Basket 3.[95]

54. IDCMA makes a slightly different argument than Ad Hoc and ARINC. It states that the Commission should reinstate price cap regulation for AT&T's "subrate digital private line services."[96] Like Ad Hoc and ARINC, it argues that AT&T is able to migrate customers with analog CPE to subrate digital private line services and that these network changes are transparent to the customer. It claims that customers are reluctant to switch to another carrier for the intercity circuit because of an "ain't broke, don't fix" mentality, and because the down time necessary to make a vendor change would be costly. IDCMA argues that AT&T is able to transfer its market power in analog private line services over to subrate digital private line services. As evidence of this phenomenon, IDCMA again refers to its claim that, in 1989, AT&T held an 88% market share in digital private line services. It argues that, in dismissing the survey results in the Interexchange Order, we failed to recognize that IDCMA's numbers represented AT&T's market share of subrate digital private line services only, while other market share estimates relied on by the Commission included high capacity digital private line services.[97]

b. Positions of the Parties

55. AT&T argues that Ad Hoc and ARINC's petitions with regard to analog private line services should be rejected. It contends that Ad Hoc and ARINC made the same claims in an unsuccessful opposition to an AT&T tariff revision, and that the definition of a service should not be dependent on the nature of the customer's terminal equipment. It states that the result sought by the petitioners is foreclosed by the plain language of the Interexchange Order, and by the Commission's finding that digital services are subject to intense competitive pressures.[98]

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[95] ARINC Petition at 8-9.

[96] IDCMA defines subrate digital private line services as "those digital private lines services offered at speeds of 64 kbps and below." IDCMA Petition at 18, n.22. AT&T, according to IDCMA, provides such services through its offering of 56/64 kbps ACCUNET Spectrum of Digital Services ("ASDS"). Id. at 21.

[97] Id. at 18-24.

[98] AT&T Opposition at 18-19. In support of its argument, AT&T submits an ex parte paper purporting to show that private line customers with analog access have choices. Its data, based on interviews of AT&T customers who have disconnected their AT&T private line service, indicate that more than half of the

56. AT&T responds to IDCMA's petition by noting that IDCMA's argument is based entirely on its market share survey. AT&T argues that our decision to further streamline digital private line services was based on findings that digital private line users are demand elastic[99], that excess capacity exists, and that AT&T has priced digital private line services consistently below the upper rate band. With respect to the market share issue, AT&T notes that the Commission found IDCMA's data were inconsistent with more recent data, and argues that the entity that performed the survey has repudiated IDCMA's attempts to project market share statistics from the survey results.[100]

c. Discussion

57. We deny the petitions of Ad Hoc and ARINC insofar as they ask us to reconsider or clarify what is meant by the term "analog private line service." We find that customers with analog CPE that are connected to digital intercity circuits have competitive options available to them. Similarly, we deny IDCMA's petition asking us to reconsider our decision to further streamline subrate digital private line services, and ARINC's petition insofar as it seeks to have us reimpose individual service bands on Basket 3 services. In order to limit AT&T's ability to subsidize rate decreases in some Basket 3 services with rate increases in other analog private line rate elements, however, we order AT&T to remove from Basket 3 analog private line services provided to government entities through contractual arrangements. We order AT&T to refile these service arrangements under Tariff 16.

58. Ad Hoc and ARINC ask us to reconsider or clarify which services fall under the heading of "analog private line services." They claim that the service should be defined by the nature of the CPE used by the customer. We retained price cap

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disconnecting customers have replaced their AT&T service with service from an AT&T competitor. Ex parte letter from L.J. Monize, Regulatory Director, AT&T, to Donna Searcy, Secretary, FCC, September 24, 1992 ("September 24 ex parte").

[99] For these purposes, a user is considered "demand elastic" if the user is willing to switch carriers or otherwise decrease the amount of services it purchases from AT&T in response to relative changes in price and quality. Interexchange Order, 6 FCC Rcd at 5884, n.29.

[100] AT&T Opposition at 16-17. IDCMA, in its reply, argues that Computer Intelligence Corporation -- the entity that performed the survey -- never repudiated the data on which IDCMA's market share statistics were based, and that these data are the most reliable market share data introduced in the proceeding. IDCMA Reply at 8.

regulation of analog private line service because of our concern that AT&T was replacing analog intercity circuits with digital circuits, and that customers relying on analog circuits had fewer competitive options than other customers. We find now, that, unlike customers with analog CPE that connect with AT&T analog intercity circuits, customers that connect with digital intercity circuits have competitive alternatives and do not require price cap protection.[101] This finding is supported by an AT&T ex parte showing that both MCI and Sprint offer a lower priced alternative for customers using voice grade (analog) access circuits connecting to digital intercity circuits.[102]

59. Ad Hoc and ARINC argue that it is not fair to define analog private line service by the nature of the intercity circuit because, in most cases, the selection of the type of intercity circuit on which the private line traffic rides is made by the carrier. This argument, however, misses the point. Our decision to streamline digital private line services was based on a finding that other carriers compete with AT&T in the provision of digital intercity circuits. Whether it was AT&T or the customer that made the decision to transition to a digital intercity circuit is irrelevant in this analysis.

60. Ad Hoc and ARINC also argue that, to the extent that competitive alternatives do exist, customers cannot avail themselves of these alternatives because changing carriers would entail reengineering their networks, installation fees, and costly down time. Petitioners give no indication, however, that these costs are significantly greater than the costs of changing providers of many other business services. Absent such a showing, we reject the conclusion that the existence of these costs serve as a significant competitive barrier in the private line services marketplace.

61. We also reject IDCMA's argument that subrate digital private line services are not competitive and are thus deserving of price cap protection. IDCMA continues to base its arguments on its

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[101] Customers with analog CPE can connect with digital intercity circuits by purchasing CPE that converts their analog signal to digital, or by having the carrier perform the conversion for them. Moreover, many customers acknowledge that they are in the process of converting older analog CPE over to digital. See ARINC Petition at 4, n.11.

[102] September 24 ex parte. AT&T also reports, based on a survey of customers disconnecting service, that better than 50 percent of its customers with analog CPE connecting to digital ASDS intercity circuits that have subsequently disconnected AT&T service have switched to a competitor's service.

1989 data alleging that AT&T holds an 88 percent market share for subrate digital private line services. As AT&T notes, however, our decision to further streamline digital private line services was based primarily on the demand elasticity of private line services customers, the existence of excess capacity for these services, and AT&T's consistently pricing digital private line services below the upper rate band under price caps.[103] IDCMA fails to address these findings. Moreover, in recent years, given the rapid deployment of digital technology by all carriers, the 1989 data offered by IDCMA cannot be relied on to reflect accurately the state of competition in the digital private line marketplace.[104] Accordingly, we reject IDCMA's contention, and reaffirm our finding that substantial competition exists for all digital private line services.

62. Finally, Ad Hoc asks us to reinstate service bands on the remaining Basket 3 services to prevent AT&T from cross-subsidizing. It claims that AT&T was able to raise the analog multipoint charge -- a Basket 3 service -- from 3 dollars per line to 15 dollars per line by lowering the rates for other Basket 3 services. We do not believe that service bands are necessary to limit AT&T's ability to cross-subsidize.[105] Instead, we conclude that AT&T's analog private line services provided under contract to government entities should be removed from Basket 3. We find that these services, because they are offered to large, sophisticated users of telecommunications services with substantial bargaining power, do not need to remain subject to price cap regulation. Moreover, we find that keeping these services in Basket 3 could enable AT&T to finance lower contract rates for these services by raising rates of other services. Accordingly, while we deny Ad Hoc's request, we order AT&T to remove these services from Basket 3 and refile them under Tariff 16.

63. In light of this change in Basket 3, we recalibrate the price cap index (PCI) and actual price index (API) for the basket to reflect the removal of all analog private line services

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[103] Interexchange Order, 6 FCC Rcd at 5892. See AT&T Opposition at 16-17.

[104] Although we did not rely on market share in concluding in the Interexchange Order that digital private services are substantially competitive, we did question the validity of IDCMA's market share data. While IDCMA correctly points out that conflicting market share data include more competitive high capacity private line services, we noted in the Interexchange Order that these data also include less competitive analog services which, to some degree cancel the effect of the high capacity services. 6 FCC Rcd at 5892, and n.106.

[105] Nor do we find that any cross-subsidization occurred.

provided under contract to government entities from this Basket. Upon the effective date of this order, the PCI and API for Basket 3 are assigned a value equal to 100, corresponding to the costs and rates in effect on the date of the adoption of this order.[106]

VI. Conclusion

64. For the reasons stated above, and as outlined above, the petitions for reconsideration are granted in part and denied in part.

VII. Ordering Clauses

65. Accordingly, pursuant to authority contained in sections 1, 4, 201-205, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 405, IT IS ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, IS AMENDED as set forth in Appendix B, effective 30 days after publication in the Federal Register.

66. IT IS FURTHER ORDERED that the petitions for reconsideration of AT&T, Ad Hoc, ARINC, Alascom, Broadcast Coalition, Citicorp, CompTel, IDCMA, MCI, Sprint and WilTel are GRANTED IN PART AND DENIED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[106] We realize that the further removal of services from Basket 3 could affect the accuracy of the productivity offset for that basket. We find, however, that, in light of the diminishing demand for analog private line services, the administrative costs of establishing a new productivity factor for analog private line services outweighs any benefits that a separate productivity factor would bring. Furthermore, we have no reason to believe that AT&T will not be able to meet the productivity goal embedded in the PCI.

APPENDIX A

Parties filing Petitions

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc. (ARINC)
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. (the Broadcast Coalition)
Citicorp
The Competitive Telecommunications Association (CompTel)
Independent Data Communications Manufacturers Association, Inc. (IDCMA)
MCI Telecommunications Corporation (MCI)
US Sprint Communications Company Limited Partnership (Sprint)
Williams Telecommunications Group, Inc. (WilTel)

Parties filing Oppositions

AT&T
Sprint
MCI filed late - motion for acceptance
General Communications, Inc. (GCI)
CompTel
Citicorp
California Bankers Clearing House Association and the New York Clearing House Association (Banking Coalition)
American Petroleum Institute (API)
Ad Hoc

Parties filing Reply Comments

AT&T
AD HOC
IDCMA
ARINC
US West
Sprint
National Telecommunications Administration (NTIA)
MCI
CompTel
Citicorp
Bankers Coalition
Alascom
ITT
Compuserve

APPENDIX B

Title 47 of the Code of Federal Regulations, Part 61, is amended as follows:

1. The authority citation for Part 61 continues to read as follows:

Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.42(b)(3) is amended to read as follows:

(b)(3) The business services basket shall contain analog private lines including, including analog voice grade private line, unless provided under contract to a government entity, and terrestrial television transmission service.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DA 95 -935
	)	
NYNEX Telephone Companies	)	
	)	
	)	
Petition for Waiver of	)	
Section 69.4(b) of the	)	
Commission's Rules	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1995 **Released:** April 27, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 8, 1994, the NYNEX Telephone Companies (NYNEX) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish new rate elements to recover the costs of operator call completion services that it plans to offer interexchange carriers (IXCs). In particular, NYNEX seeks a waiver of Section 69.4(b) of the rules,[1] which provides that local exchange carrier (LEC) charges for access services shall include certain specified rate elements. NYNEX proposes to establish two additional rate elements for its new operator-assistance services.[2] These new services would provide IXCs with live and automated operator assistance for such tasks as dialing instructions, carrier rate information, calling card validation, and billing number screening services.[3] NYNEX Petition at 2. NYNEX states that its waiver petition is similar to the petitions filed earlier by Southwestern Bell Telephone Company and Bell Atlantic Telephone Companies, and is supported by similar public

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[1] 47 C.F.R. § 69.4(b).

[2] Those two new rate elements include automated call processing and operator assistance call processing.

[3] In addition, NYNEX indicates that it will be offering call recording and call rating services on a non-tariffed basis, consistent with the Commission's decision in Detariffing of Billing and Collection Services, Report and Order, 102 FCC 2d 1150, 1151 n.2 (1986) (*Billing and Collection Order), recon. denied,* 1 FCC Rcd 445 (1986).

interest considerations. In this regard, NYNEX asserts, its service offering will provide IXCs and their customers with a greater choice of interstate operator services, which will in turn stimulate further competition in the telecommunications market. *Id.* at 3. NYNEX's waiver request is unopposed.

2. Commission rules may be waived for good cause shown.[4] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[5] In addition, the United States Court of Appeals for the District of Columbia Circuit has stated that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[6] Waiver is thus appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.[7]

3. The Bureau has previously considered almost identical waiver requests from Bell Atlantic and Southwestern Bell. It granted those requests, finding that "the proposed offerings of Bell Atlantic and Southwestern Bell would bring IXCs and their customers a greater choice of interstate operator services" and that "[s]uch increased choices would generally foster competition."[8] In addition, the Bureau concluded that "grant of the requested waivers would enable Bell Atlantic and Southwestern Bell to establish new rate elements that are tailored precisely to fit their respective services rather than attempting to force their services into existing rate elements."[9] Furthermore, the Bureau stated that "[c]reation of new rate elements would also advance the goals of the Commission's access charge regime by enabling the carriers to better match relevant costs and rate elements, thus allowing Bell Atlantic and Southwestern Bell to better recover the cost of their services from those customers who use them."[10] Finally, the Bureau determined that it would be premature to address cost issues in the waiver request because neither Bell Atlantic nor Southwestern Bell had yet filed a tariff transmittal to

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[4] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[5] *Northeast Cellular Tel. Co. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

[6] *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[7] *Northeast Cellular*, 897 F.2d at 1166.

[8] Bell Atlantic Telephone Companies and Southwestern Bell Telephone Company, Petitions for Waiver of Section 69.4(b) of the Commission's Rules, 9 FCC Rcd 7868 (Com. Car. Bur. 1994) (*Bell Atlantic/SWB Call Completion Services Order*).

[9] *Id.* at 7870.

[10] *Id.*

implement their proposed rate elements.[11]

4. We conclude that there is no material difference between Bell Atlantic's and Southwestern Bell's operator call completion services and NYNEX's operator call completion services. Thus, as good cause existed to permit those carriers to establish separate rate elements for their services, it exists as well to permit NYNEX to establish rate elements for its operator call completion services. We further conclude that NYNEX -- like Bell Atlantic and Southwestern Bell -- was not required to address cost issues in its waiver request because its has not yet filed its tariff to offer operator call completion services. Therefore, we grant NYNEX's waiver request.

5. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, and 0291, the petition for waiver filed by the NYNEX Telephone Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

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[11] *Id.*

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-19
Washington, D.C. 20554

In the Matter of	)	
	)	
Proposed 708 Relief Plan and	)	IAD File No. 94-102
630 Numbering Plan Area Code	)	
by Ameritech - Illinois	)	

DECLARATORY RULING AND ORDER

Adopted: January 12, 1995; Released: January 23, 1995

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. On August 4, 1994, three paging companies, Mobilemedia Communications, Inc., Paging Network, Inc., and Page Mart, Inc. (Petitioners), filed a Request for Declaratory Ruling and Interlocutory Order (Petition). Petitioners object to a plan Ameritech (Ameritech) developed to relieve an anticipated shortage of telephone numbers in that part of Illinois covered by area code 708. Petitioners request a declaratory ruling from the Commission stating that aspects of the Ameritech plan violate the Communications Act and industry guidelines. Petitioners also request an interlocutory order to restore the status quo ante. After thorough consideration of the record before us,[1] we grant the petition in part and deny it in part for the reasons discussed below.

II. BACKGROUND

2. Telephone numbers in the United States are composed of a three-digit area code, a three-digit central office code, and a four digit line number.[2] Area codes are assigned by Bell Communications Research, Inc. (Bellcore), which serves as administrator of the North American Numbering Plan (NANP).[3] Within each geographic area, the predominant local exchange carrier traditionally has served as the administrator of the area code. Ameritech is the largest local exchange carrier in northern Illinois and serves as the administrator of area code 312 (serving Chicago) and area code 708 (which covers an adjacent suburban area). In its role as administrator, Ameritech also assigns central office codes to other carriers and itself and performs certain planning functions. In addition to assigning codes to itself, Ameritech assigns the central office codes to cellular carriers, paging companies, competitive access providers, and others needing telephone numbers within the

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[1] A Public Notice seeking comment was released on August 19, 1994. On September 16, 1994, 18 parties filed comments. Ameritech filed comments and a motion to accept late-filed comments on September 19, 1994. On September 30, 1994, 19 parties filed reply comments. See Appendix.

[2] For example, in the telephone number 708-555-6000, the area code is 708, the central office code is 555, and the line number is 6000. Area codes are more formally called "Numbering Plan Area" codes or NPA codes. Central office codes are also called CO codes and sometimes referred to as NXX or NNX codes.

[3] The NANP specifies the ten digit-telephone number format used by 18 nations, including the United States and Canada, that share a common numbering system in North America. In addition to conventional ten-digit telephone numbers, numbering resources include service access codes (e.g., 800 and 900 codes), N11 codes (e.g., 411, 911), and carrier access codes (e.g., 10XXX). See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, 9 FCC Rcd 2068 (1994) (NANP NPRM).

two area codes. Carriers that have been assigned central office codes then use these codes to distribute telephone numbers to their customers.[4]

3. In early 1994, Ameritech announced that the supply of central office codes within area code 708 was nearing exhaustion and subsequently presented its plan for providing relief. Ameritech proposed to use a new area code (630) as an "overlay." An "overlay" NPA covers the same geographical area as an existing area code, or area codes, and allows customers in the area to be served through either code. The proposed overlay would cover the same geographical area as existing area codes 708 and 312. The plan would require cellular and paging carriers to surrender or "give back" central office codes currently assigned to them. Their customers, in turn, would have to surrender the telephone numbers currently assigned to them that are served using the central office codes that Ameritech would "take back".

4. Ameritech's relief plan has several components: Ameritech would cease providing central office codes in area code 708 to cellular and other wireless companies. It would reserve the remaining codes in 708 for wireline customers. Until a new area code became available, wireless companies requesting numbering resources in area code 708 would be assigned central office codes from the 312 area code. The central office codes returned by wireless carriers would then be used by Ameritech to assign numbers to its own customers, and by competitive access providers and other wireline carriers to assign numbers to their customers. This plan, in Ameritech's view, would minimize the disruptions to the Chicago metropolitan area in general. On July 29, 1994, Ameritech petitioned the Illinois Commerce Commission (ICC) for approval of its plan.[5] The ICC has not completed its consideration of the plan.

III. ANALYSIS

A. Federal/State Jurisdiction

Pleadings

5. No party challenges this Commission's broad authority over numbering matters. Notwithstanding our undisputed jurisdiction over numbering, several parties request that this Commission refrain from exercising its jurisdiction over numbering issues until the Illinois proceeding has been concluded. Some commenters, including the ICC, suggest that this Commission delay any decision concerning Ameritech's plan until after the ICC has

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[4] Each central office code represents 10,000 telephone numbers.

[5] A copy of the Ameritech plan was filed with the Commission as an attachment to an ex parte presentation by Ameritech. See Letter from C. O'Connell, Director-Federal Relations, Ameritech, to Commission (Sept. 14, 1994), Attachment 15.

acted.[6] The ICC points out that it is conducting an expedited proceeding that will permit all parties to engage in discovery, file testimony, and cross-examine witnesses -- and that two of the three petitioners are actively participating.[7] On the other hand, the Association for Local Telecommunications Services (ALTS) argues that we must act now because we cannot delegate our exclusive authority to the ICC and appoint the ICC, in essence, as our arbitrator.[8]

6. Many parties urge us to grant the Petition in its entirety, notwithstanding the ICC's current consideration of these matters.[9] Other parties contend that we should set "overarching policies" for area code relief even if we do not become involved in the Illinois dispute. Commenters request that the Commission address possible future discrimination and seek parallel treatment of all carriers and neutrality in the administration of telephone number resources. For example, Southwestern Bell Mobile Systems (SBMS) argues this Commission should permit the ICC to continue its investigation, but that we should prohibit discrimination, proscribe any "take-back" of numbers, and ensure that area code relief plans similar to Ameritech's proposal are not implemented elsewhere.[10] US West also supports a declaratory ruling that would provide general guidelines for future administration of these central office codes.[11] Commenters also request the Commission to expedite its proceeding in CC Docket No. 92-237. [12] AirTouch adds "neutrality requires that all new growth be

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[6] See ICC Comments at 3.

[7] Id. 2; Petitioners Page Mart, Inc. and Paging Network, Inc. are participating in the ICC proceeding.

[8] See ALTS Reply Comments at 1-4. ALTS contends that we have "exclusive jurisdiction" over this dispute, and therefore, any decision by the ICC "would be quickly mooted upon judicial review." Id. at 3.

[9] Air Touch Comments at 1-8; Apple Comments at 1-4; ALTS Comments at 1; CTIA Comments at 1-5; FMCA Comments at 1-6; McCaw Comments at 1; MCI Comments at 1; Nextel Comments at 8; Page America Comments at 13; Page Net Comments at 1; PICA Comments at 1; ProNet Comments at 1-5; Sprint Comments at 1-4; TCG Comments at 1-8.

[10] See SBMS Reply at 7-8; see also, McCaw urges us not only to intervene in the Ameritech case, but also to intervene in the Pacific Bell overlay plan. McCaw Reply at 4.

[11] See US West Reply at 2.

[12] See NANP NPRM.

assigned numbers out of a new overlay code from the beginning, and not on a wireless-first, wireline-later basis."[13]

7. Contending that area code relief should be the responsibility of the states, Ameritech and others urge the Commission not to become involved in area code relief planning.[14] In particular, Ameritech opposes any national rules that might "limit the flexibility of the states to respond to diverse local circumstances and the need for continuity in local dialing plans."[15] Similarly, Pacific Bell recommends that the Commission leave "boundary" decisions to the relevant states.[16] USTA also encourages the Commission to allow states to oversee area code relief plans.[17]

Discussion

8. The pleadings raise two related issues. First, we take this opportunity to address the breadth of our jurisdiction over numbering resources. Second, we must consider whether, in exercising our authority under our jurisdiction, we should delay our decision to consider the action taken by the ICC in making our decision.

9. As to the first issue, it is undisputed by the parties that we have broad authority to oversee telephone numbering issues. Moreover, we recognize that we have made prior statements that could be interpreted to mean that we believe that our authority over numbering resources occupies the entire regulatory field.[18] However, several state

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[13] See AirTouch Comments at 6; see also, Comments of Apple at 2-3; ALTS at 2; CTIA at 3; McCaw at 5; MCI at 6; Nextel at 4; Pacific at 6; Page America at 4; PageNet at 3-5; PCIA at 4; ProNet at 3; Sprint at 2; SWBMS at 2.

[14] See Ameritech Comments at 2; see also, Ameritech Reply at 6; ICC Comments at 3-4; Pacific contends that the FCC should leave to individual states "decisions as to boundaries of the overlay" the "process...of relief implementation...and assignment of NXXs within the new area code." Pacific Comments at 11; SBMS at 18; see also, US West Reply Comments at 6; USTA Reply Comments at 7.

[15] Ameritech Reply at 7.

[16] Pacific Bell Comments at 11.

[17] USTA Reply at 7.

[18] See, e.g., Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910, 2912, para. 19 (1987). In that order, we stated in dicta that we had plenary jurisdiction of numbering issues. That dicta is inconsistent with our analysis here and is overruled. None of our specific rulings in that order is modified here.

commissions have addressed essentially local disputes related to or arising from planned or proposed implementation of new area codes. As a result, there may be some uncertainty as to whether our jurisdiction over telephone numbering resources forecloses state action. We take this opportunity to clarify this matter.

10. The Communications Act establishes a dual regulatory system over telephone service by granting to the Commission the authority to regulate "interstate and foreign commerce in wire and radio communication,"[19] while reserving to the states "jurisdiction with respect to . . . intrastate communication service . . . ."[20] Thus, we recognize that the states have a role and certain interests in regulating numbering resources. For example, NARUC noted in a Resolution adopted in November, 1994 that "NPA overlays, boundary realignments and splits may involve many state specific variations in local dialing patterns that may be responsive to local geographic circumstances or certain local customer expectations. . . . [and that] State commissions are uniquely positioned to understand, judge and determine [those] local circumstances and customer expectations . . ."[21]

11. While there is no need for us to take such action now, we recognize that there might be situations in the future in which a state's regulation of local exchange carriers' activities related to the NANP administration could raise the issue of preemption. Under Louisiana PSC,[22] the Commission may preempt state regulation of intrastate telephone services where it is "not possible to separate the interstate and intrastate components of the asserted regulation."[23] We may preempt intrastate regulation when (1) the matter to be regulated has both interstate and intrastate aspects; (2) preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would "negate" the exercise of our authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects.[24]

12. As we have already observed, NPAs and the associated telephone numbers assigned under the NANP are essential to the routing and billing of both interstate

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[19] 47 U.S.C. §151.

[20] 47 U.S.C. §152 (b).

[21] A copy of the NARUC resolution was filed as an ex parte presentation with the Commission. See Letter from J. B. Ramsay, Deputy Assistant General Counsel, NARUC, to Commission (December 21, 1994).

[22] Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986) (Louisiana PSC).

[23] Id. at 375 n.4 (emphasis in original).

[24] Public Service Comm'n of Maryland v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

and intrastate calls. NPAs must be used to complete an interstate call, and where more than one NPA exists within the borders of a state, it may also be necessary to use the NPA to complete an intrastate call. Thus the administration of NPAs and telephone numbers has both interstate and intrastate aspects.

13. The overarching goal of the Communications Act is to make available to all the people of the United States "a rapid, efficient, Nation-wide, and world-wide wire and radio communications service ."[25] We have identified the introduction of new technologies, the modernization of the nation's telecommunications infrastructure, and the offering of new services to the public as objectives essential to realizing this statutory goal.[26] We rely heavily upon competition as the best means for obtaining these objectives. The role that the NANP plays with respect to each of these goals is illustrated not just by the petition before us but also by such recent proceedings as the ones involving the introduction of the 500 NPA, which will facilitate the introduction of a new service predicated upon recent technological advances, and the assignment of N11 codes, which are used in some areas already to provide enhanced services. We believe a nationwide, uniform system of numbering is essential to the efficient delivery of interstate and international telecommunications services. Title II of the Act presents the statutory scheme upon which we rely to achieve both the immediate and overarching goals listed above. In particular, we rely upon Sections 201(b) and 202(a) of the Act, which require that carriers' practices and services are just and reasonable and that the carriers not discriminate unreasonably in their performance of their practices and services.[27] These important federal regulatory objectives guide our consideration of NANP issues.

14. We find that it is a practical and economic impossibility to separate NPAs for local use from NPAs for interstate use. Not only are NPAs scarce resources,[28] but also, it would be technologically impossible to have separate NPAs for interstate and intrastate telephone calls. Thus under Louisiana PSC, we may preempt state actions concerning the NANP if they would thwart our regulatory goals. We conclude this discussion of jurisdiction, however, by restating our recognition that state regulators clearly have legitimate interests in the administration of the NANP. We would expect that they would continue to exercise regulatory supervision over the NANP as it affects intrastate telecommunications just as we intend to continue exercising our regulatory authority to

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[25] 47 U.S.C. §151.

[26] See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, aff'd in part and modified in part, Memorandum and Order on Reconsideration, FCC 94-269 (released Nov. 7, 1994).

[27] 47 U.S.C. §§202 (a) and 201, respectively.

[28] See NANP NOI, CC Docket No. 92-237, 7 FCC Rcd 6837, 6838, para. 11 (1992).

resolve NANP issues clearly of interstate concern. We will continue to monitor the administration of the NANP to assure that our goals are being met.

15. We now address whether we should delay our consideration of the Petition before us until the ICC completes its review of the Ameritech numbering plan. We believe it is important to consider the merits of Ameritech's numbering plan. Ameritech's area code relief plan is one of several similar plans proposed recently to address number shortages throughout the country.[29] The issues raised in the Petition require prompt response because it appears that central office codes in the 708 NPA are approaching exhaustion and that Ameritech has suspended issuing such codes to certain carriers that provide interstate and interstate access services (including affiliates of the Petitioners).[30]

16. We decline to adopt the viewpoint of those commenters who urge that we should defer to the ICC on these issues or at least await the outcome of the current proceedings before the ICC. While this Commission has often allowed local commissions and interested parties to resolve their own disputes involving area code relief, we are concerned not only about defects in Ameritech's plan under the Communications Act, but also about the possibility that such defects may appear in plans now being drawn for other areas of the country. Thus, we conclude that we should not delay responding to the Petition because of: (a) the impact on interstate and foreign telecommunications; (b) the clear violations of the Communications Act with respect to various parts of the Ameritech Plan (as described below); and (c) the strong possibility that some of the defects in the plan may be repeated in the code relief plans being drawn for other parts of the country.[31] We think it appropriate promptly to identify the defective parts of the plan as originally proposed and provide guidance on these matters so that we can assure that such plan defects are not implemented by other code administrators. We believe that this will allow for more efficient and foresightful planning in anticipation of the exhaustion of other area codes in other parts of the country.

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[29] For example, Pacific Bell has proposed an overlay for the relief of area code 310 in Los Angeles. See Pacific Comments at 3. BellSouth has also proposed overlay plans for relief of area code 305 in Florida and 404 in Atlanta.

[30] See supra paras. 3-4.

[31] See Teleport Communications Group Inc. Petition for Declaratory Ruling, "Ensuring Competitive Fairness in the Treatment of Competitive Local Carriers in the Implementation of New Overlay NPA Codes by Existing Number Plan Administrators," which addresses Pacific Bell's proposed relief plan for the 310 area code in Los Angeles, December 5, 1994. Also, Public Notice, IAD File No. 94-104, (Dec. 15, 1994), seeking comment on Petition.

B. Federal Policy Objectives for the North American Numbering Plan (NANP)

17. This matter presents this Commission with an opportunity to express some initial views on broad policy objectives it believes should and could be achieved through judicious administration of the NANP. It also permits us to identify at least some options for addressing number exhaustion that would clearly be inconsistent with those objectives, all of which are grounded upon the congressional intent manifested in Title II of the Act.

18. Administration of the NANP will significantly affect the ease with which new telecommunications services and enhanced services are introduced in the future. In general, we believe that administration of the NANP must reflect sensitivity to the growth and dynamic nature of the communications industry if our regulatory goals identified above are to be realized. If it is to achieve such sensitivity, administration of the plan must seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient, timely basis to communications services providers. In general, we believe that a successful administration of the NANP will not unduly favor or disadvantage any particular industry segment or group of consumers. Similarly, we believe that the administration of the plan should not unduly favor one technology over another. Thus, the NANP should be largely technology neutral. We believe that an administration of the NANP that follows these broad guidelines will generally be consistent with the goals referenced above.[32] We agree with those commenters in this proceeding that have noted the importance of the NANP to achieving our regulatory goals.[33]

19. The ready availability, and use, of numbering resources by communications services providers is essential if the public is to receive the communications services it wants and needs. The timely availability of numbers is essential if new providers are to enter and new services are to appear in the telecommunications marketplace. For example, new wireless service providers and competitive access providers (CAPs) can not offer service without adequate access to new telephone numbers. Unavailability of numbers, or an unreasonable allocation of available numbers, could prevent or discourage consumers from taking new services.

20. Measuring the Ameritech plan to address the rapidly approaching exhaustion of the numbers available in the 708 area code against the principles we have

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[32] This statement of overarching federal principles is not intended to upset pending temporary arrangements in situations where: (1) there is mutual agreement between the code administrator and the affected carriers seeking numbers; and (2) such arrangements are taken as emergency measures to ease the transition to more permanent numbering arrangements consistent with the principles enunciated herein.

[33] See supra para 6; see also, ex parte Letter from T.G. Wheeler, President CTIA, to Commissioners (January 5, 1995). Also, Bellcore Comments at 4; US West Reply at 8.

described, we find that it is deficient. In reaching this conclusion, we note that under Title II, a carrier may not discriminate unreasonably in its "charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . ."[34] We find that Ameritech's proposed numbering plan would unreasonably discriminate against wireless carriers and in so doing, violates the principle that NANP administration should strive to be technology neutral. The Ameritech numbering plan would, moreover, impose significant costs and burdens on its wireless competitors that could delay or eliminate the introduction of new services from such providers. Thus, the Ameritech numbering plan could thwart our regulatory goals seeking to encourage new services for consumers and the introduction of additional competition in provision of communications services.

C. Unreasonable Discrimination

Pleadings

21. Petitioners identify several facets of Ameritech's plan that they allege to be unreasonably discriminatory in violation of Section 202(a) of the Communications Act.[35] Specifically, the Petitioners challenge the following: Ameritech's proposal to continue assigning NPA 708 codes to wireline carriers (including competitive access providers), while excluding paging and cellular carriers from such assignments ("exclusion proposal"); Ameritech's proposal to require only paging and cellular carriers to take back from their subscribers and return to Ameritech all 708 telephone numbers previously assigned to them, while wireline carriers would not be required to do so ("take-back proposal"); and Ameritech's proposal to assign all numbers to paging and cellular carriers exclusively from the existing NPA 312 and the new NPA 630, while wireline carriers (and perhaps others) may continue to receive such assignments from NPA 708 ("segregation proposal").[36]

22. As a result of these proposals, Petitioners contend that paging and cellular carriers and their customers, unlike other similarly situated carriers and their customers, will be compelled to bear most of the costs of relieving the shortage of 708 central office codes.[37] Specifically, Petitioners claim that, under Ameritech's plan, paging and cellular customers (but not wireline customers) will be required to accept the inconveniences of changing their telephone numbers and paying to reprogram wireless

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[34] 47 U.S.C. §202 (a).

[35] See Petition at 4-6 and 20-22.

[36] Id. at 3-6.

[37] Id. at 9-12.

telephone equipment.[38] Moreover, after Ameritech's plan has been implemented, customers of paging and cellular carriers generally will have to dial more digits than wireline customers to utilize their respective services.[39]

23. Ameritech acknowledges that its "exclusion" proposal, "take-back" proposal, and "segregation" proposal, would respectively: exclude paging and cellular carriers from access to any new NPA 708 numbers; require such carriers to return NPA 708 numbers; and eventually require them to use NPA 312 and later NPA 630 exclusively. Ameritech, nevertheless, denies that its plan results in unjust or unreasonable discrimination. Ameritech contends such proposals are necessary and reasonable because: (a) the largest proportion of recent demand for NPA 708 numbers has come from wireless carriers; (b) transfer of such carriers to NPA 312 (and later to NPA 630) from NPA 708 would most significantly decrease demand for increasingly scarce NPA 708 numbers; and (c) the transfer of such carriers to NPA 312 (and later NPA 630) codes would not have a significant impact on either their customers, the network, or the dialing plan.[40]

24. Ameritech also insists its plan does not unreasonably discriminate against wireless carriers because its proposal "treats all providers of wireless services, including [Ameritech's cellular] affiliate, alike."[41] Ameritech contends that, "having wireless carriers utilize 312 NXX codes, instead of 708 NXX codes, was the only feasible conservation measure" because that approach made additional codes available while at the same time preventing exhaustion of the NPA 708 codes. Ameritech argues that, unlike wireline carriers, paging and cellular carriers are able to utilize NPA 312 codes within the 708

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[38] Id. at 19; see also SBMS Comments at 10. SBMS further argues that hundreds of thousands of customers will need to go to various locations for reprogramming their customer owned equipment, and a wireless overlay will necessitate PBX equipment owners to reprogram (or replace) their equipment to process calls to the new wireless overlay. SBMS Reply at 2.

[39] Local calls within the same area code would continue to be dialed as seven-digit calls. Local calls from one area code to another would require the dialing of eleven-digits (1 plus the area code plus the seven digit number). Calls from one wireline customer to another within area code 708 would remain seven-digits. Similarly, calls from a wireless customer in 630 to another wireless customer in that same area code would also be seven digits. Because the majority of customers would remain in 708, those subscribers with numbers in area code 630 would have to dial extra digits more frequently than customers with numbers in area code 708. See also Petition at 4-5.

[40] See Ameritech Reply at 3-4.

[41] Id. at 4; see also ProNet Comments at 2; Ameritech Cellular proposed an amendment to the Ameritech plan, whereby it could continue to assign 708 numbers after August 1, 1994 for its "Smart Call Forwarding Service."

geographical area because their wireless terminals do not have a fixed (hard-wired) location on the public switched network.[42] Thus, a paging customer located in the geographic area covered by area code 708 could be issued a number using area code 312.

Discussion

25. It is undisputed that, under Section 202(a), Ameritech cannot "make any unjust or unreasonable discrimination" in "practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any . . . class of persons . . . or to subject any . . . class of persons . . . to any undue prejudice or disadvantage."[43] In deciding whether any "unjust or unreasonable discrimination" has occurred, the Commission and the Courts have generally applied a three-part test.[44] The test involves, first, a comparison of the services provided to determine if "like" services have been offered by the carrier to different customers.[45] Second, a determination is made as to whether "like" services have been offered by the carrier under different terms or conditions. Third, if different terms or conditions of service have been offered to different customers for "like" services, a determination must then be made as to whether the different terms or conditions are just and reasonable under the circumstances.[46]

26. Applying the three-part discrimination test to Ameritech's proposed plan for administering the 708, 312, and 630 area codes, we conclude that Ameritech would make telephone numbering resources (central office codes within these area codes) available to both wireless and wireline carriers and, therefore, would be offering "like" services to different customers. Ameritech also would make central office codes in different NPAs, available to wireless and wireline carriers, thus offering "like" services under different terms

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[42] Ameritech Reply at 7; see also Pacific Reply Comments at 3-5. Pacific Bell, which is contemplating an overlay modification in Los Angeles, will include both wireline and wireless carriers by the end of 1996, and notes that wireless users will be the exclusive users of a new area code, but only on a transitional basis. See also SWB Reply Comments at 2. SWB, which is also considering an overlay area code in Texas to alleviate a potential numbering shortage in the Houston area, has proposed a general purpose overlay rather than a service-specific wireless overlay.

[43] See 47 U.S.C. §202(a).

[44] See, e.g., ABC v. FCC, 663 F.2d 133 (D.C. Cir. 1980); MCI v. FCC, 917 F.2d 30 (D.C. Cir. 1990); Western Union v. FCC, 568 F.2d 1012 (2d Cir. 1977).

[45] See Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1982).

[46] See MCI Telecommunications Corp. v. FCC, 842 F.2d 1296 (D.C. Cir. 1988).

or conditions. Ameritech acknowledges its plan would treat wireless carriers different from wireline carriers.[47] We find that three facets of Ameritech's plan would discriminate between classes of carriers: (a) its "exclusion" proposal; (b) its "segregation" proposal; and (c) its "take-back" proposal.[48]

27. We find Ameritech's "exclusion" and "segregation" proposals would confer significant competitive advantages on the wireline companies in competition with paging and cellular companies, and, in particular, Ameritech itself. Similarly, Ameritech's "take-back proposal" would confer a significant competitive advantage on wireline carriers that would be permitted to retain their NPA 708 numbers because customers of those carriers would be able to avoid the inconvenience associated with number changes. On the other hand, paging and cellular companies would be placed at a distinct disadvantage by the "take-back proposal" because their customers would suffer the cost and inconvenience of having to surrender existing numbers and go through the process of reprogramming their equipment, changing over to new numbers, and informing callers of the new number.

28. Ameritech's purported justifications for these proposals are not persuasive in light of the disproportionate burden they would appear to place on some classes of carriers, but not others. Ameritech has not shown that other plans that do not have unreasonably discriminatory impacts could not also equally meet the needs for additional numbering resources. Regardless of the particular industry segment making the most requests for numbering resources at any particular time, Ameritech must treat all applicants for such codes in an impartial manner, providing telephone number resources in accordance with the Act. NPA codes and the central office codes assigned within the NPA code should be viewed as essential resources to be shared as fairly and equitably as possible by all those carriers who require such codes to offer interstate access service to their customers. Thus, on the record before us, we find that Ameritech's plan would unlawfully discriminate against paging and cellular carriers. Accordingly, we find as a matter of law that each of these three Ameritech proposals violates the prohibition in the Act against unjust or unreasonable discrimination.

29. In addition, we do not believe that Ameritech's plan is consistent with an administration of the NANP that would meet our regulatory goals. As stated, we believe that a successful administration of the NANP should seek to accommodate new telecommunications services and providers by making numbering resources available in a way that does not unduly favor one industry segment or technology and by making numbering resources available on an efficient, timely basis. We believe that assignment of numbers based on whether the carrier provides wireless service is not consistent with these

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[47] See supra paras. 23-24.

[48] See para. 21 in which we describe each of these facets of the Ameritech plan.

objectives and could hinder the growth and provision of new beneficial services to consumers.

D. Unjust, Unreasonable Conduct

Pleadings

30. Petitioners identify several aspects of Ameritech's plan that they allege constitute unjust and unreasonable practices in violation of Section 201(b) of the Communications Act.[49] Into this category of unlawful acts, they place Ameritech's "exclusion," "take-back," and "segregation" proposals described earlier.[50]

31. Petitioners also contend the Ameritech plan violates applicable industry guidelines. In this regard, Petitioners claim that Ameritech did not provide affected parties with a meaningful opportunity to participate in formulating the plan, and that Ameritech failed to give adequate consideration to the "disparate impact" of its plan on paging carriers and their customers. In addition, Petitioners contend Ameritech's "exclusion" proposal violates the industry's "first-come, first-served" standard for assignment of central office codes.[51] Petitioners further contend Ameritech's plan would be "particularly onerous" in view of alternatives to the plan that would be less expensive and more reasonable for all affected wireline and wireless carriers, and for their respective subscribers.[52] Finally, Petitioners request an interlocutory order to "preserve the status quo ante." While the meaning of this request is not entirely clear, it appears Petitioners would like the Commission not only to declare portions of the Ameritech plan to be unlawful but also, on an interlocutory basis, to require Ameritech to reverse certain unspecified actions already taken.[53] Several parties note that the concept of a wireless-only overlay is a departure from normal industry practices.[54] Bellcore, the Administrator of the North American Numbering Plan, notes that it "has long opposed service-specific code assignments" and that it informed

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[49] See Petition at 19-20.

[50] Id. at 9-11, 19-20, see also supra, paras. 21-22.

[51] Id. at 12.

[52] Id. at 11-12.

[53] Petition at 1.

[54] See, e.g., US West Reply at 2. See also Petition at 8 ("[i]f such discriminatory plans were tolerated, there could be no guarantee that success in the market were the result of one's skill and ingenuity, including one's choice of technology and services").

Ameritech that it assigned the 630 overlay code to Ameritech "for both voice and mobile uses."[55]

32. Ameritech asserts that it followed applicable guidelines in formulating its plan.[56] Alternatively, if the Commission finds that the plan or its formulation conflicts with such guidelines, Ameritech argues that the draft NPA relief guidelines give the parties (presumably Ameritech and affected carriers) authority to "refine the NPA-specific conservation procedures as necessary until NPA relief" is achieved.[57] USTA argues that any such conflict asserted is not relevant in any event, because industry guidelines for NPA code relief have not yet been formally adopted. Further, even if these draft guidelines had been formally adopted, USTA contends that compliance with such guidelines would be voluntary.[58] In addition, Ameritech contends that, in an emergency situation such as the one faced in NPA 708, "first-come, first-served" policies must be suspended. Ameritech claims that if it continued to assign central office codes to all applicants on that basis, the supply of codes would be exhausted quickly or some form of code rationing would be needed.[59] While it does not specifically address Petitioners' request for an interlocutory order, Ameritech generally urges that their request be "expeditiously dismissed."[60]

Discussion

33. Section 201(b) of the Act requires that all common carrier "practices, classifications, and regulations for and in connection with . . . communications service . . . be just and reasonable . . . " and declares any unjust or unreasonable practice, classification, or regulation to be unlawful.[61] On the basis of the record before us and for the reasons set out

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[55] Bellcore Reply at 3-4.

[56] Ameritech Comments at 2.

[57] Ameritech Reply at 6.

[58] USTA Reply at 2-3.

[59] Ameritech Reply at 7.

[60] Ameritech Comments at 8.

[61] See 47 U.S.C. §201(b). By comparison, Section 202(a) of the Act, 47 U.S.C. §202(a), makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in . . . practices, classifications, regulations, facilities, or services for or in connection with like communications service . . . ." Accordingly, certain common carrier practices, classifications, or regulations may violate both §§201(b) and 202(a); however, not every violation of one section is necessarily a violation of the other. See, e.g., Illinois Bell v. AT&T, 4 FCC Rcd 7759, 7760, para. 6 (1989) (Illinois Bell). We additionally believe that

below, we agree with Petitioners that Ameritech's "exclusion," "take-back," and "segregation" proposals represent unjust and unreasonable practices under Section 201(b) of the Act and therefore would be unlawful if implemented.

34. Ameritech states that its area code relief plan "is the only feasible plan that expands the number of codes available and ... ensures an uninterrupted supply of codes." Ameritech argues that its plan, which included the "needs of paging customers" and customer surveys was designed to balance three objectives: (a) an optimal dialing plan for customers, (b) "as minimal a burden as feasible . . ., " and (c) "an uninterrupted supply of codes and numbers."[62] Ameritech additionally states that it will "bear a substantial burden . . . as a result of reprogramming switches." As code administrator in the Chicago area, Ameritech states that it bears the costs of making "massive translations into switches required to implement the 630 NPA . . . (and) must also adjust its internal billing systems . . . in moving cellular codes from 708 to 630 numbers."[63]

35. We agree with Ameritech that any area code relief plan that becomes effective should strike an optimal balance among the three objectives it identifies. We find that the optimal balance must assure that any burden associated with the introduction of the new numbering code falls in as evenhanded a way as possible upon all carriers and customers affected by its introduction. We find that three facets of Ameritech's plan -- its "exclusion," "take-back," and "segregation" proposals -- prevent that plan from achieving such an optimal and evenhanded balance of the three objectives. In particular, we find that Ameritech's plan would impose a disproportionate burden upon wireless carriers and their customers. As noted earlier, each of the three proposals would impose significant competitive disadvantages on the wireless carriers, while giving certain advantages to wireline carriers, including Ameritech itself. The justifications Ameritech offers for incorporating these proposals in its plan are not persuasive because those justifications cannot override the fact that a plan built upon the "exclusion", "take-back," and "segregation" proposals would inhibit competition in the interstate access market. While every violation of Section 202(a) is not necessarily a violation of Section 201(b),[64] in this particular case, we find the selective and asymmetric treatment of carriers in the administration of telephone

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provision of central office codes can be considered both a "service" and a "practice" for and in connection with communications services within the meaning of sections 201(b) and 202(a).

[62] See Ameritech Comments at 6.

[63] See Ameritech Reply at 8.

[64] See, e.g., Illinois Bell, 4 FCC Rcd at 7760 para. 6 (because just and reasonable rates are defined by a zone of reasonableness, two rates may be just and reasonable under Section 201 yet unlawfully discriminatory under Section 202).

number resources is also an unjust and unreasonable practice that violates Section 201(b) of the Act.

E. Delegated Authority

36. We believe that it will facilitate Commission supervision of numbering issues if the Common Carrier Bureau addresses them in the first instance pursuant to delegated authority. The Common Carrier Bureau will resolve these issues in coordination with the Wireless Telecommunications Bureau and other Bureaus. Thus, we authorize the Common Carrier Bureau to act for the Commission under delegated authority in resolving future number resource allocation disputes.[65]

IV. CONCLUSION

37. Ameritech has proposed a numbering plan that, if implemented, would be unreasonably discriminatory and constitute unjust and unreasonable discrimination in violation of the Communications Act. Accordingly, we grant in part the Petitioners' request for a ruling that parts of Ameritech's plan described above as the "exclusion," "take-back," and "segregation" proposals are unlawful under the Act. We make no further judgment on the plan. We deny the Petitioners' request seeking an interlocutory order to restore the status quo ante.

V. ORDERING CLAUSES

38. Accordingly, pursuant to Section 1, 4(i), 201-205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C.§§151, 154(i), 201-205, and 403, and pursuant to Section 1.2 of the Commission's Rules, 47 CFR §1.2, IT IS ORDERED that the Request for Declaratory Ruling filed by Mobilemedia Communications, Inc., Paging Network, Inc., and Page Mart, Inc. is GRANTED IN PART and IS OTHERWISE DENIED as set forth herein.

39. IT IS FURTHER ORDERED that Ameritech's Motion to accept late-filed comments is hereby accepted.

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[65] See 47 C.F.R. §0.291.

40. IT IS FURTHER ORDERED that the Request for Interlocutory Order filed by Mobilemedia Communications, Inc., Paging Network, Inc., and Page Mart, Inc. IS DENIED as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix

Petitioners

1. Mobilemedia Communications, Inc. (MobileMedia)
2. Paging Network, Inc. (PageNet)
3. Page Mart, Inc. (Page Mart) (collectively, "Petitioners")

Commenting Parties

1. AirTouch Communications (AirTouch)
2. Apple Communications, Inc. (Apple)
3. Association for Local Telecommunications Services (ALTS)
4. Cellular Telecommunications Industry Association (CTIA)
5. Florida Mobile Communications Association, Inc. (FMCA)
6. Illinois Bell (Ameritech-Illinois) (late)
7. Illinois Commerce Commission (ICC)
8. McCaw Cellular Communications, Inc. (McCaw)
9. MCI Telecommunications Corporation (MCI)
10. Nextel Communications, Inc. (Nextel)
11. Pacific Bell (Pacific)
12. Page America of Illinois, Inc. (Page America)
13. Paging Network, Inc. (PageNet)
14. Personal Communications Industry Association (PICA)
15. ProNet Inc. (ProNet)
16. Southwestern Bell Mobile Systems, Inc. (SBMS)
17. Sprint Corporation (Sprint)
18. Teleport Communications Group Inc. (TCG)

Replying Parties

1. AirTouch Communications (AirTouch)
2. Association for Local Telecommunications Services (ALTS)
3. Bell Communications Research, Inc. (Bellcore)
4. BellSouth Corporation and Bellsouth Telecommunications, Inc. (BellSouth)
5. California Cable Television Association ((CCTA)
6. Illinois Bell (Ameritech)
7. Los Angeles Cellular Telephone Company (LACTC)
8. McCaw Cellular Communications, Inc. (McCaw)
9. MCI Telecommunications Corporation (MCI)
10. Nextel Communications, Inc. (Nextel)
11. Pacific Bell (Pacific)

12. Page America of Illinois, Inc. (Page America)
13. Paging Network, Inc. (PageNet)
14. Personal Communications Industry Association (PCIA)
15. Southwestern Bell Telephone Company (SWBT)
16. Southwestern Bell Mobile Systems, Inc. (SBMS)
17. Sprint Corporation (Sprint)
18. US West
19. United States Telephone Association (USTA)

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Proposed 708 Relief Plan and 630 Numbering Area Code by Ameritech-Illinois, Declaratory Ruling and Order

In this Order, the Commission articulates the key principles to establish federal policy interests in the administration of the North American Numbering Plan (NANP) and applies them to an area code relief plan proposed by Ameritech. The Commission states that: (1) the NANP must seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient, timely basis to communications services providers; and (2) the administration of the plan should not favor any one industry segment or any one technology over another. The Commission finds that Ameritech's proposed area code relief plan did not meet these principles and would violate the Communications Act, and that Ameritech's plan -- to require all cellular and paging customers in the Chicago area to use a new area code and to return numbers previously assigned to carriers and their customers in an existing area code -- is discriminatory. These principles are applied with respect to a proposed overlay by Ameritech, which was an effort to relieve an anticipated shortage of telephone numbers in the Chicago suburbs that are covered now by the 708 area code.

To the extent that numbering issues play a critical role in the development of competition for local exchange services, I support principles in this Order that may help to preclude numbering plans that place unreasonable burdens on a particular class of carriers or discourage the entry of new communications services. I write separately, however, to emphasize my concern that the Commission's actions to apply these principles could affect or limit the processes in states where commissions are reviewing the numbering plans in their jurisdictions. In this regard, I'm concerned that our action not effectively preempt regulatory options in Illinois as well as other states currently considering various numbering plans, although I understand that such a result is unintended. Nonetheless, I believe that the benefits of general guidance to ensure open entry and access to communications markets are significant and enable me to support this decision.

FCC 95-20

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY-	)	
CABLE TELEVISION	)	CC Docket No. 87-266
Cross-Ownership Rules,	)	
Sections 63.54-63.58	)	

FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: January 12, 1995 **Released: January 20, 1995**

Comment Date: March 6, 1995
Reply Comment Date: March 21, 1995

By the Commission: Commissioners Barrett, Ness, and Chong issuing separate statements.

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I. INTRODUCTION

1. In recent years, we have adopted a series of orders to permit telephone companies to play a broader role in the video marketplace.[1] The "video dialtone" framework we established in these orders was designed to be consistent with the cross-ownership restrictions imposed by the Cable Communications Policy Act of 1984 (1984 Cable Act).[2] The telco-cable cross-ownership ban prohibits telephone companies from providing video programming directly to subscribers in their telephone service areas.

2. The United States Courts of Appeals for the Fourth and Ninth Circuits recently ruled that the 1984 Cable Act's cross-ownership restriction violates the First Amendment rights of telephone companies.[3] United States District Courts in three other circuits have also reached the same conclusion.[4] We issue

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1 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) (First Report and Order), aff'd, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992) (Memorandum Opinion and Order on Reconsideration), aff'd, National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994) (NCTA v. FCC (1994)); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Second Report and Order), aff'd, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269 (released Nov. 7, 1994) (Video Dialtone Reconsideration Order), appeal pending sub nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

2 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b), 98 Stat. 2779 (codified at 47 U.S.C. § 533(b)) ("telco-cable cross-ownership ban or restriction").

3 Chesapeake & Potomac Tel. Co. of Virginia v. United States, No. 93-2340 (4th Cir. Nov. 21, 1994) (C&P Tel. Co. v. U.S.); U S West, Inc. v. United States, No. 94-35775, D.C. No. CV-93-01523-BJR (9th Cir. December 30, 1994) (U S West v. U.S.).

4 BellSouth Corp. v. United States, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994) (BellSouth v. U.S.); Ameritech Corp. v. United States, 867 F.Supp. 721 (N.D. Ill. 1994); (Ameritech

this Fourth Further Notice of Proposed Rulemaking to consider changes in our video dialtone rules and policies in light of these decisions, and to consider the extent to which Title II and Title VI of the Communications Act apply to telephone companies providing video programming directly to subscribers in their telephone service areas over video dialtone facilities. We intend through this notice to consider rules and policies to govern the provision of video programming over video dialtone facilities by telephone companies not subject to the 1984 Cable Act cross-ownership restriction. To the extent a telephone company remains subject to the ban, our existing video dialtone framework will continue to apply. We also seek comment on certain related issues.

II. BACKGROUND

3. The telco-cable cross-ownership restriction has its roots in a Commission rule adopted in 1970. At that time, the cable television industry was in its infancy, and the Commission was concerned that, if permitted to offer cable television services in their telephone service areas, telephone companies would be able to monopolize this emerging industry. In the 1984 Cable Act, Congress enacted a provision modeled after the Commission's cross-ownership restriction. The new statutory ban prohibited telephone companies from providing video programming directly to subscribers in their telephone service areas.[5] "Video programming" was defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[6] The legislation also included a rural exemption and waiver authority for the Commission.[7]

4. In 1991, the Commission proposed to amend its telco-cable cross-ownership rules to permit local exchange carriers (LECs) to play a broader role in the video marketplace, consistent with the 1984 Cable Act.[8] Specifically, the Commission proposed to permit LECs to provide video dialtone service, which it described as "an enriched version of video common carriage under which LECs will offer various non-programming services in addition to the underlying video

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v. U.S.) NYNEX Corp. v. United States, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994) (NYNEX v. U.S.).

5 See 47 U.S.C. § 533(b)(1).

6 47 U.S.C. § 522(19).

7 Id. § 533(b)(3), (b)(4).

8 See First Report and Order, 7 FCC Rcd 300.

transport."[9] The Commission concluded that LECs offering video dialtone service would not need a cable franchise under Section 621(b) of the 1984 Cable Act because (1) video dialtone service is not "cable service" as defined in the 1984 Cable Act and (2) LECs are not "cable operators" as defined in that Act.[10] In addition, the Commission determined that an independent customer-programmer of a LEC's video dialtone platform is not a "cable operator" and consequently, is not subject to the franchise requirement of the 1984 Cable Act.[11] The Commission's video dialtone-franchise decisions have been upheld by the U.S. Court of Appeals for the District of Columbia Circuit in NCTA v. FCC (1994).[12]

5. In 1992, the Commission adopted the video dialtone proposal outlined in its 1991 Notice.[13] Under video dialtone, LECs may offer, on a nondiscriminatory basis, a basic common carrier video delivery platform capable of accommodating multiple video programmers.[14] This "first level platform" is subject to regulation under Title II of the Communications Act. LECs may also offer enhanced and other non-regulated services provided they comply with existing regulatory safeguards.[15] LECs proposing to construct video dialtone facilities must first obtain approval

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9 Id. at 306, para. 10.

10 Section 621(b)(1) provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1).

11 First Report and Order, 7 FCC Rcd at 327-28, para. 52.

12 NCTA v. FCC (1994), 33 F.3d 66.

13 See generally, Second Report and Order, 7 FCC Rcd 5781.

14 Second Report and Order, 7 FCC Rcd at 5797, para. 29.

15 Id. at 5811, para. 58, 5828, para. 92. These safeguards include accounting and cost allocation rules to separate the costs of providing enhanced and other non-regulated services from the costs of providing regulated services, as well as network disclosure rules to ensure that telephone equipment manufacturers and vendors have adequate notice of changes that could affect the compatibility of their equipment with the network. In addition, we held that the Bell Operating Companies (BOCs) and GTE Services Corporation (GTE) must adhere to Open Network Architecture (ONA) requirements and other safeguards adopted in the BOC Safeguards Order, including rules governing the use of customer proprietary network information. See infra note 70.

under Section 214 of the Communications Act of 1934, as amended (the Act).[16]

6. Consistent with the 1984 Cable Act's cross-ownership restriction, the Commission prohibited LECs offering video dialtone service from providing video programming directly to subscribers in their telephone service areas, either through the telephone operating company or through an affiliate.[17] A LEC would be deemed to "provide" video programming if it determined how video programming is presented for sale to subscribers, including making decisions concerning the bundling, or "tiering" of the programming or the price, terms, or conditions on which the programming is offered to subscribers.[18] In addition, LECs were precluded from holding an ownership interest of 5 percent or more in a video programmer that offers service in a LEC's telephone service area.[19] At the same time, however, we recommended that Congress amend the 1984 Cable Act to permit LECs, subject to appropriate safeguards, to provide video programming directly to subscribers in their telephone service areas.[20] We stated that if Congress repealed the ban, we would consider imposing certain safeguards on LECs providing video programming directly to subscribers. These safeguards included: a structural separation requirement; a requirement that the LEC's video programming services be provided through the video dialtone platform that provides service to multiple video programmers; and

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16 Second Report and Order at 5820, para. 72; see 47 U.S.C. § 214(a).

17 The Commission adopted detailed ownership and non-ownership affiliation rules to implement this requirement. These rules are set forth at 47 C.F.R. § 63.54. The Commission is currently considering changes to its ownership attribution rules in various other contexts. See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, Notice of Proposed Rulemaking, MM Docket Nos. 94-150, 92-51, and 87-154, FCC No. 94-324 (released January 12, 1995). We ask for comment on what impact, if any, any such changes in other contexts might have here.

18 Second Report and Order at 5817, para. 69; Video Dialtone Reconsideration Order at para. 64.

19 Second Report and Order at 5801, 5819, paras. 36, 71; see Video Dialtone Reconsideration Order at paras. 64-70.

20 Second Report and Order, 7 FCC Rcd at 5847, para. 135.

a limit on the percentage of overall platform capacity a LEC could use to transmit its own programming.[21]

7. In October 1994, we affirmed the basic video dialtone framework, while modifying our specific video dialtone rules and policies in various respects.[22] We also affirmed and reiterated our recommendation that Congress repeal the 1984 Cable Act cross-ownership ban. We stated that "[g]iven the enormous growth of the cable industry during the past decade, the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly."[23] We noted that while there remains some risk of anticompetitive behavior by LECs, this risk can and should be addressed through our video dialtone framework and other appropriate regulatory safeguards.[24] We did not comment on the need for any particular safeguards, indicating instead that we would address these issues in a subsequent proceeding.

8. Congress has not repealed the telco-cable cross-ownership restriction. Several federal courts have, however, declared the ban unconstitutional as a violation of the First Amendment.[25] The Fourth Circuit, for example, determined that the cross-ownership ban violates the free speech clause because it is not "narrowly tailored to serve a significant government interest" and does not make ample alternative methods of communication available that are "sufficiently similar to the method foreclosed by the regulation."[26]

III. FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

A. Governing Statutory Provisions

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21 Id. at 5847-48, para. 135.

22 See Video Dialtone Reconsideration Order, supra note 1.

23 Video Dialtone Reconsideration Order at para. 265.

24 Id.

25 See C&P Tel. Co. v. U.S., U S West v. U.S., BellSouth v. U.S., Ameritech v. U.S., and NYNEX v. U.S., supra notes 3 and 4.

26 C&P Tel. Co. v. U.S., No. 93-2340, slip op. at 31, 40 (citations omitted). The Ninth Circuit also found the provision was not "narrowly tailored," but declined to reach the issue of the availability of "ample alternative channels of communications." U S West v. U.S. slip op. at 15913.

9. LEC provision of video programming raises questions about whether Title II, Title VI, or both, would govern particular LEC video offerings, and how these provisions might apply to a LEC's provision of video programming directly to subscribers within its telephone service area and over facilities used to provide both voice and video services. We now seek comment on these issues and on the analysis we offer below.[27]

1. Application of Title II to LEC Video Programming Offerings

10. We first tentatively conclude that telephone companies should be permitted to provide video programming over Title II video dialtone platforms. We recently reaffirmed our conclusion that the construction of video dialtone systems would serve the public interest goals of facilitating competition in the provision of video programming services, encouraging efficient investment in our national information infrastructure, and fostering the availability to the American public of new and diverse sources of video programming.[28] Two U.S. Courts of Appeals have now held unconstitutional the specific statutory basis for prohibiting a telephone company from providing, directly or indirectly, programming over its own video dialtone platform.[29] In light of the public interest benefits of a video dialtone platform, which provides multiple video programmers with common carrier-based access to end users, we tentatively conclude, in the absence of Section 533(b), that we should not ban telephone companies from providing their own video programming over their video dialtone platforms. We note that we allow telephone companies to use their networks to provide their

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27 We recognize the existence and importance of a number of other policy and legal issues beyond those raised in this Notice. In general, we note that the entry of telephone companies into the provision of video programming also raises questions regarding the impact of our regulation on the ability of cable operators to respond to the deployment of video dialtone, as well as broader issues regarding potential regulatory disparities among video dialtone providers, cable operators, and other multichannel video programmers. Our decision to issue this Notice to address the specific questions arising directly from the recent court decisions is not intended to foreclose future consideration elsewhere of these broader issues.

28 Video Dialtone Reconsideration Order at para. 3.

29 See generally, C&P Tel. Co. v. U.S. and U S West v. U.S. supra note 3.

own enhanced services today, subject to safeguards. Thus, in the absence of a demonstration of a significant governmental interest to the contrary, we propose to allow telephone companies to provide video programming over their own video dialtone platforms, subject to appropriate safeguards. We seek comment on this proposal, and on whether any such significant governmental interest to support a ban exists and, if it does, whether a ban would be a narrowly tailored restriction on the telephone companies' First Amendment rights.

11. A second Title II issue is whether we can, and should, require telephone companies to provide video programming only over video dialtone platforms. Even before the recent court decisions invalidating the telco-cable cross-ownership ban, there were three circumstances in which LECs could provide video programming directly to subscribers. Within their telephone service areas, LECs have been permitted to provide video programming in areas covered by the rural exemption to the telco-cable cross-ownership ban, or if they received a waiver of Sections 613(b)(1) or (b)(2).[30] In both these situations, we have required LECs to obtain authorization under Section 214 of the

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30 See 47 U.S.C. §§ 533(b)(3), (b)(4); 47 C.F.R. §§ 63.56, 63.58. Section 613(b)(4) authorizes the Commission to waive the cross-ownership prohibition under either of two independent criteria. First, the Commission may waive the restriction when it determines that "the provision of video programming directly to subscribers through a cable system demonstrably could not exist [within the LEC's telephone service area] except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved." 47 U.S.C. § 533(b)(4). Alternatively, the Commission may grant a waiver upon other showing of good cause. Id. The Commission has exercised its authority to grant waivers of the cross-ownership ban in certain circumstances. See Time Warner Entertainment Co., L.P. and U S WEST Communications, Inc., 8 FCC Rcd 7106 (1993) (granting temporary waiver of prohibition upon demonstration of good cause to permit divestiture of cable systems after a merger); General Tel. Co. of California, 4 FCC Rcd 5693 (1989)(good cause waiver to permit telephone company involvement in cable television experiment), remanded, NCTA v. FCC, 914 F.2d 285, 287 (1990) (NCTA v. FCC (1990)), waiver rescinded on remand, 8 FCC Rcd 8178 (1993), aff'd sub nom. GTE California, Inc. v. FCC, 39 F.3d 940 (9th Cir. 1994) (GTE California v. FCC), petition for rehearing pending; Shenandoah Tel. Co., 84 FCC 2d 371 (1981) (granting waiver for good cause based on small size and rural nature of areas in question).

Communications Act before constructing facilities.[31] In addition, outside their telephone service area, LECs have been able to purchase an existing cable system or apply for a franchise to construct a new cable system.[32] A LEC is not required to apply for Section 214 authorization if it is constructing facilities for the provision of cable service outside of its telephone service area.[33] In all these instances, there was a video programming offering that was treated as a traditional cable offering requiring a franchise under Title VI.

12. In these circumstances, however, LECs have not been authorized to use their local exchange facilities to provide cable service, but, rather, to construct or purchase interests in separate cable facilities. Indeed, as noted by the court in NCTA v. FCC (1994), it was not until after the 1984 Cable Act that technological advances have made it practical to deliver video signals over the same common carrier networks that are used to provide telephone service.[34] Previously, as the court noted, "[a] telephone company that wanted to provide cable service would have had to construct a coaxial cable distribution system parallel to its telephone system."[35]

13. We seek comment on whether we have authority under Section 214 to require LECs that seek to provide video programming directly to subscribers in their telephone service areas to do so on a video dialtone common carrier platform and not on a non-common carrier cable television facility. We seek comment on what circumstance would warrant such a requirement, and specifically on whether we should require use of a video dialtone platform whenever a LEC provides video services over

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31 47 U.S.C. § 214(a).

32 For example, SBC Communications, Inc., a holding company that owns a Bell Operating Company providing local exchange and exchange access telephone services in the southwestern United States, purchased two cable systems in the metropolitan Washington, D.C. area from Hauser Communications, Inc. in early 1994. U S WEST, Inc. also recently completed its acquisition of cable systems in the Atlanta, Georgia area, which is outside of its LEC's telephone service area. In both these examples, the LEC holds a cable franchise pursuant to Section 621 from the local franchising authority.

33 47 C.F.R. § 63.08(a).

34 NCTA v. FCC (1994), 33 F.3d at 69.

35 Id.

facilities that are also used in the provision of telephone services. We seek comment on our authority generally to require LECs seeking Section 214 authority to acquire or construct video facilities to comply with our video dialtone framework.[36]

2. Application of Title VI to LEC Provision of Video Programming

14. We now seek comment on the circumstances, if any, in which a LEC that, by court decision, is not subject to the 1984 Cable Act telco-cable cross-ownership ban may offer a cable service subject to Title VI in lieu of a Title II video dialtone offering. We also seek comment on the extent to which Title VI should apply to video programming provided by LECs on a Title II video dialtone system. As noted, we have previously held that LEC provision of a common carrier video dialtone platform is not subject to Title VI of the Act.[37] In particular, we found that such LECs are not offering "cable service," and are not operating a "cable system" within the meaning of Title VI.[38] We reasoned

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36 See 47 U.S.C. § 214(c).

37 First Report and Order, 7 FCC Rcd at 324, para. 50, aff'd, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd at 5070, para. 11.

38 First Report and Order, 7 FCC Rcd at 326-27, para. 51, aff'd, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd at 5071-73, paras. 13-25. The Commission also determined that an independent customer-programmer of a LEC's video dialtone platform is not a "cable operator" and consequently, is not subject to the franchise requirement of the 1984 Cable Act. See supra para. 4.

The 1984 Cable Act defines a "cable operator" as

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(5). A "cable system" is defined as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment

that LECs did not actively participate in the selection and distribution of video programming because they were precluded from providing video programming directly to subscribers in their telephone service areas.[39] We also concluded that video dialtone facilities are not cable systems because they are common carrier facilities subject to Title II of the Act which, under Commission rules, could not be used for LEC provision of video programming directly to subscribers in the LEC's telephone service area.

15. We now seek comment on whether, if a LEC, or its affiliate, does provide video programming over its video dialtone system and actively engages in the selection and distribution of such programming, that LEC, or its affiliate, is subject to Title VI. We seek comment on the Commission's legal authority to determine whether some, but not all, provisions of Title VI relating to cable operators would apply to a LEC that provides video programming over its video dialtone platform. We also seek comment on whether the application of some or all provisions of Title VI would result in a regulatory framework that is duplicative of, or inconsistent with, federal or state regulation of communications common carriage. For example, the goals of the leased access provision of Title VI could be met through obligations Title II imposes on a LEC as the provider of the video dialtone platform whether or not the LEC as a video service provider provides its own leased access channels.[40] We seek comment on the potential impact of our determinations in this proceeding on existing grants by state and local authorities of public rights-of-way. We also invite parties to discuss both the legal and practical implications of requiring, or not requiring,

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> that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . .
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> (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers . . . .
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> 47 U.S.C. § 522(7).

39 See Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd at 5071, 5072-73, paras. 16, 24.

40 See 47 U.S.C. § 532.

telephone companies providing video programming over their own video dialtone systems to comply with each of the various provisions of Title VI. In the event that Title VI cable rate regulation rules apply, we seek comment on how such rules would apply to a LEC providing video programming directly to subscribers over its own video dialtone platform.

16. In addition, we seek comment on whether, if Title VI does not apply to telephone companies' provision of video programming on video dialtone facilities, the Commission should adopt, under Title II, provisions that are analogous to certain aspects of Title VI. For example, we seek comment on whether we should adopt rules governing program access by competing distributors, carriage agreements between video service providers and unaffiliated programmers, and vertical ownership restrictions.[41]

17. Finally, we note that the court's opinion in NCTA v. FCC (1994) is consistent with the Commission's reasoning in the First Report and Order that a LEC providing video dialtone service does not require a local franchise because the LEC does not provide the video programming. We seek comment on whether this view would require a LEC offering video dialtone service to secure a local franchise if that LEC also engages in the provision of video programming carried on its platform.

B. Regulatory Safeguards Governing a Local Exchange Carrier's Provision of Video Programming on its Video Dialtone Platform

1. Introduction and Scope

18. In this section we consider what changes, if any, need to be made to our video dialtone regulatory framework if a telephone company, pursuant to an applicable court decision, decides to become a video programmer on its own video dialtone platform in its telephone service area.[42] Our previous decisions

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41 See infra para. 23.

42 In amendments to its Section 214 applications to provide video dialtone service, Bell Atlantic requested permission from the Commission to provide video programming over its own video dialtone systems. See Bell Atlantic Telephone Company (Bell Atlantic), File No. W-P-C 6912 (application filed December 16, 1993, amendment filed June 16, 1994), Bell Atlantic, File No. W-P-C 6966 (application filed June 16, 1994). The Commission granted Bell Atlantic's amended application to provide video programming over its video dialtone system in a market trial in Northern Virginia,

establishing the regulatory framework for video dialtone were premised on the assumption that LECs would not be able to be customer-programmers of their own video dialtone systems. Our purpose herein is to determine whether LEC provision of video programming raises new concerns about anticompetitive behavior or cross-subsidy that our existing regulatory framework and safeguards may not sufficiently address. In addressing the issues identified below, parties should address whether we should apply different safeguards for technical and market trials than for commercial offerings of video dialtone.

2. Ownership Affiliation Standards

19. Under our current rules, LECs are prohibited from providing video programming directly to subscribers, and from having a cognizable (i.e., 5 percent or more) financial interest in, or exercising direct or indirect control over, any entity that is deemed to provide video programming in its telephone service area.[43] Although we now propose to permit telephone companies to provide video programming over video dialtone platforms, we propose to retain these ownership affiliation standards to identify those video dialtone programmers that we will consider to be affiliated with LECs providing the underlying common carriage. Under this proposal, if the Commission determines that LEC ownership of video programming requires additional safeguards, those safeguards would apply if the LEC owned five percent or more of a video programmer. We seek comment on this proposal.

3. Safeguards Against Anticompetitive Conduct

a. Sufficient Capacity to Serve Multiple Service Providers

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subject to certain conditions. Bell Atlantic, File No. W-P-C-6834 (released January 20, 1995) (Bell Atlantic Market Trial Order).

43 In the Video Dialtone Reconsideration Order, the Commission affirmed, with some modifications and clarifications, its ownership affiliation rules. The Commission upheld its earlier determination that, consistent with the cross-ownership ban, it was impermissible for a LEC to own five percent or more of a video programmer. For purposes of the video dialtone rules, a video programmer was defined as any person who provides video programming directly, or indirectly through an affiliate, to subscribers. See Video Dialtone Reconsideration Order at paras. 64-74. See also supra para. 6.

20. Under the video dialtone regulatory framework, a LEC is required to provide sufficient capacity to serve multiple service providers on a nondiscriminatory basis. In the Video Dialtone Reconsideration Order, we rejected use of an "anchor programmer," that is, allocation of all or substantially all of the analog capacity of the video dialtone platform to a single programmer.[44] We seek comment on whether there are other across-the-board rules that we should adopt to ensure that video dialtone retains its essential Title II character when a LEC becomes a video programmer on its platform.

21. We seek comment, for instance, on whether we should limit the percentage of its own video dialtone platform capacity that a LEC, or its affiliate, may use. Such a limit could help ensure other programmers access, but may create a risk that some capacity might go unused. We seek comment on what an appropriate limit would be; whether any percentage limit should vary with the platform's capacity; and whether different rules should apply to analog and digital channels.[45] Video dialtone capacity constraints appear likely to be most severe in the short-term, with respect to analog channels, and may be of less concern on future all-digital systems. Commenters should address whether LEC use of video dialtone capacity raises short-term or long-term concerns, and how the probable duration of the problem should affect our regulatory approach. Alternatively, we seek comment on whether LECs that deny capacity to independent programmers should be subject to procedural requirements more detailed than those imposed in the Video Dialtone Reconsideration Order.[46]

22. In the Third Further Notice of Proposed Rulemaking (Third Further Notice), the Commission sought comment and information regarding channel sharing mechanisms that LECs have proposed as means of making analog capacity available to more customer-programmers than might otherwise be accommodated.[47] Parties addressing limits on LEC use of the video dialtone platforms should comment in this proceeding on the relationship between such channel sharing mechanisms and any proposal to limit LEC use of analog channels. The Third Further Notice also sought comment on two other signal carriage issues: (1) whether the

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44 Video Dialtone Reconsideration Order at para. 35.

45 We have previously suggested that a 25% capacity limit "strikes a reasonable balance among competing risks and benefits involved." Second Report and Order, 7 FCC Rcd at 5850-1 n.360.

46 Id. at para. 38.

47 Id. at paras. 268-275.

Commission should mandate preferential video dialtone access or rates for commercial broadcasters, public, educational and governmental ("PEG") channels, or other not-for-profit programmers; and (2) whether the Commission should permit LECs to offer preferential treatment to certain programmers on a voluntary ("will carry") basis.[48] Parties should comment in this proceeding on the relationships among mandatory preferential treatment, "will carry," and any proposed limits on a LEC's use of its video dialtone capacity to provide programming directly to subscribers.

23. Another example of potentially anticompetitive conduct that has been cited in the context of cable television service under Title VI involves channel positioning.[49] Programmers assert that cable operators can and do deliberately assign unaffiliated program services to undesirable channel locations.[50] Under Title II, such discriminatory conduct is prohibited. We seek comment on whether LECs that are also video program providers have an increased incentive to use their control over the video dialtone platform to engage in such activities and what, if any, specific safeguards we should implement to prevent such conduct. In particular, we seek comment on whether the channel positioning rules that apply to cable operators in the context of the "must-carry" requirement of Title VI[51] should also apply to video dialtone platform operators providing programming directly to subscribers in their local exchange service areas.

b. Non-Ownership Relationships and Activities Between Telephone Companies and Video Programmers

24. In the Video Dialtone Reconsideration Order, the Commission affirmed, with certain modifications, its decision to permit LECs to enter into non-ownership relationships with video

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48 Id. at paras. 280-284.

49 See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565, 8583-84, paras. 41-43 (1993).

50 See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 FCC Rcd 4962, 5040, para. 151 (1990).

51 47 U.S.C. § 534(b)(6). In general, 47 U.S.C. § 534 requires cable operators to carry local television station signals and qualified low power television station signals.

programmers that exceed a carrier-user relationship.[52] Under the modified rules, a LEC is permitted to provide enhanced and other nonregulated services related to the provision of video programming (e.g., billing and collection or video gateway services) to any video programmer in its telephone service area, provided that the area is substantially served (i.e., 70 percent of the households in that area) by a video dialtone platform.[53] In addition, a LEC is not restricted by our rules regarding other types of non-ownership relationships with video programmers who are not franchised cable operators.[54]

25. At the same time, however, the Commission did not permit LECs to exceed the carrier-user relationship with cable operators, except to provide enhanced or other nonregulated services related to the provision of video programming in an area substantially served by a video dialtone platform, or to lease cable drop wires.[55] In addition, the Commission generally prohibited affiliations between LECs and any video programmer for the purpose of operating a basic video dialtone platform.

26. After C&P Tel. Co. v. U.S. and U S West v. U.S., we propose, at a minimum, to retain these restrictions as safeguards against LEC anticompetitive conduct and to promote further LEC deployment of broadband services. We believe that the restrictions on non-ownership affiliations between LECs and cable operators are important to the Commission's goal of promoting competition in the video services marketplace, and are not overbroad infringements on LEC First Amendment rights. Parties should comment on the proposal to retain these safeguards and should describe any specific additional measures they believe necessary to safeguard against anticompetitive conduct by LECs that offer programming on their own video dialtone systems.

c. Acquisition of Cable Facilities

27. Throughout much of the video dialtone proceeding, the Commission has expressed a concern that LEC acquisition of in-region cable facilities to provide video dialtone could impede

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52 Video Dialtone Reconsideration Order at paras. 87-102.

53 Id. at para. 87.

54 Id. at para. 88.

55 The Commission permits LECs to lease cable drop wires from cable operators, subject to certain conditions. See Video Dialtone Reconsideration Order at paras. 54-55.

competition.[56] In the Video Dialtone Reconsideration Order, the Commission substantially affirmed its decision to prohibit telephone companies from acquiring cable facilities in their telephone service areas for the provision of video dialtone.[57] We continue to believe that this ban will benefit the public interest by promoting greater competition in the delivery of video services, increasing the diversity of video programming available to consumers, and advancing the deployment of the national communications infrastructure.[58] We tentatively conclude that the ban on LEC acquisition of cable facilities for the provision of video dialtone does not impermissibly restrict LEC speech under C&P Tel. Co. v. U.S. and U S West v. U.S., and seek comment on this conclusion.

28. In the Third Further Notice, the Commission recognized that some markets may be incapable of supporting two video delivery systems. The Commission was concerned that, in such markets, the prohibition could preclude establishment of video dialtone service, thereby denying consumers the benefits of competition and diversity of programming sources that our video dialtone regulatory framework is designed to promote. As a result, the Commission requested parties to suggest criteria that would permit us to identify those markets in which two wire-based multi-channel video delivery systems would not be viable.[59] We seek comment on how, if at all, the decisions in C&P Tel. Co. v. U.S. and U S West v. U.S. should affect our consideration of criteria for allowing exceptions to our two-wire policy. We also seek comment on whether we should ban telephone company acquisition of cable facilities, with or without exceptions, if (a) Title VI applies to telephone companies providing programming on their own video dialtone platforms; or (b) telephone companies are permitted to become traditional cable operators in their own service areas instead of constructing video dialtone platforms.

d. Joint Marketing and Customer Proprietary Network Information

29. In the Video Dialtone Reconsideration Order, the Commission also affirmed its decision to permit LECs to engage in joint marketing of basic and enhanced video services, and of

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56 See, First Report and Order, 7 FCC Rcd at 309-310, para. 17. See also, Second Report and Order, at 5837-38, paras. 109-111.

57 Video Dialtone Reconsideration Order at para. 48.

58 Id. at para. 48.

59 Id. at paras. 276-79.

basic video and non-video services.[60] We found that significant public interest benefits can accrue from the efficiencies and innovations that may be obtained by permitting LECs to engage in joint marketing of basic and enhanced video services, and of basic video and non-video services.[61] We also found that the record on reconsideration did not support a finding that joint marketing of common carrier video and telephony services would have an anticompetitive impact on the provision of video programming to end users. We now seek comment on whether LEC provision of video programming directly to end users requires that we revisit our analysis of joint marketing issues.[62]

30. In the Bell Atlantic Market Trial Order the Commission authorized Bell Atlantic to conduct a six-month video dialtone market trial that will include provision of video programming directly to subscribers by a Bell Atlantic affiliate as well as by independent video programmers.[63] Pending resolution of the instant rulemaking proceeding, we conditioned Bell Atlantic's authorization on its compliance with existing safeguards for the provision of nonregulated services, including enhanced services, and with several additional, interim safeguards against discrimination.[64] We seek comment on whether any or all of these interim safeguards should be adopted as permanent requirements for LECs that provide video programming over their own video dialtone platforms.

31. Included among the Commission's existing nonstructural safeguards are customer proprietary network information (CPNI) requirements. Under these requirements, the Commission limits the BOCs' and GTE's use of CPNI; requires them to make CPNI available to competitive enhanced service providers (ESPs) designated by a customer; and requires that they make available to ESPs non-proprietary aggregated CPNI on the same terms and conditions on which they make such (CPNI) available to their own enhanced service personnel.[65] In the Video Dialtone Reconsideration Order, the Commission affirmed its decision to

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60 Id. at para. 240.

61 Id. at paras. 234-242.

62 Id. at paras. 239-242.

63 See Bell Atlantic Market Trial Order, supra note 42.

64 Id. at para 22.

65 Id. at para. 235.

apply existing enhanced services CPNI rules to video dialtone.[66] We determined that there was insufficient evidence to conclude that our existing CPNI rules do not properly balance our CPNI goals relating to privacy, efficiency, and competitive equity in the context of video dialtone.[67] The Commission also required the BOCs and GTE to provide additional information regarding the kinds of CPNI to which they will have access as a result of providing video dialtone service and indicated its intent to seek further comment on such information.[68] We now seek additional comment and information on whether LEC provision of video programming impacts the balancing of our goals for CPNI.

32. In addition to concerns over possible anticompetitive use of CPNI, parties should discuss whether LEC provision of video programming raises new concerns regarding consumer privacy. Parties that perceive a greater threat to consumer privacy should describe with specificity their concerns, and suggest specific safeguards for protecting consumer privacy, and explain how these suggestions benefit the public interest.

33. We also seek comment on safeguards to ensure nondiscriminatory access to network technical information. In the Bell Atlantic Market Trial Order, the Commission required Bell Atlantic to provide all video programmers with nondiscriminatory access to technical information concerning the basic video dialtone platform and related equipment.[69] The Commission also noted that, in the circumstances of the market trial, Bell Atlantic would also be subject to the more specific Computer III network disclosure rules.[70] We seek comment on

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66 Id. at para. 239.

67 Id. at para. 243 & n.456.

68 Id. at para. 244.

69 See Bell Atlantic Market Trial Order at para. 36.

70 See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7603-04, para. 70 (1991) (BOC Safeguards Order), vacated in part and remanded, California v. FCC. See also Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36 (released January 11, 1995), para. 23 (BOCs must continue to comply with Computer III safeguards against discrimination pending Commission action in response to the remand of the BOC Safeguards Order in California v. FCC, see infra note 71. As noted below, see infra note 71, the Ninth Circuit set aside, in part, our BOC Safeguards Order on review, finding that we had failed to

whether the Bell Atlantic condition should be adopted as a permanent safeguard. We also ask parties to address whether the Computer III network disclosure rules should be modified in any way for application in the video dialtone context.

4. Safeguards Against Cross-Subsidization of Video Programming Activities

34. In the Video Dialtone Reconsideration Order, the Commission determined that price cap regulation and accounting safeguards would be effective to prevent cross-subsidization of video dialtone-related nonregulated activities.[71] We tentatively conclude that these safeguards against cross-subsidization apply to LEC provision of video programming just as they would to any other activity not regulated as Title II common carrier service, and that the existing rules are adequate to forestall cross-subsidy of the video programming activity.[72] We seek comment on

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explain adequately our decision to lift structural separation requirements generally, based on the level of network unbundling reflected in the approved BOC ONA plans. California v. FCC, 39 F.3d at 929, 930. In any event, we propose here to consider whether structural separation is necessary or appropriate in the context of video programming services. See infra at para. 39.

71 Video Dialtone Reconsideration Order at paras. 179-182. The U.S. Court of Appeals for the Ninth Circuit recently vacated in part and remanded the BOC Safeguards Order, on the ground that the Commission had not adequately explored how, without full unbundling of BOC networks from ONA, discrimination could be prevented. The Ninth Circuit also held that the Commission did show that its regime of nonstructural safeguards adequately prevented improper cross-subsidization of enhanced services by BOCs. California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California v. FCC). See BOC Safeguards Order, supra note 70.

72 The Commission's accounting safeguards for nonregulated activities apply to most activities that are not classified as common carrier communications services for Title II purposes. Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities. Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and their Affiliates, 2 FCC Rcd 1298, 1307-08, paras. 69-78 (1987) (Joint Cost Order). Thus, those safeguards would apply to LEC video programming activities even if LEC provision of video programming were found to be

these tentative conclusions.

35. Assuming we do not require structural separation, LECs will have the flexibility to conduct video programming activities both within the telephone operating company and through affiliates. For those video programming activities conducted in the operating company, the LEC will be required to record costs and revenues in accordance with Part 32 of the Commission's Rules, the Uniform System of Accounts (USOA), and to separate the costs of video programming activity from the costs of regulated telephone service in accordance with the Part 64 joint cost rules.[73] We tentatively conclude that these rules are adequate to prevent cross-subsidization of video programming activities. We also tentatively conclude that we will apply to video programming activities the rule adopted in the Video Dialtone Reconsideration Order requiring LECs to amend their cost allocation manuals to reflect video dialtone-related nonregulated activities within 30 days of receiving video dialtone facilities authorization. We seek comment on these tentative conclusions.

36. If a LEC chooses for business reasons to provide video programming through an affiliate, the accounting treatment of operating company transactions with that affiliate will be governed by the affiliate transactions rules.[74] We seek comment on whether amendments to those rules are needed to safeguard against abuses in transactions between LECs and affiliated video program providers. Specifically, we seek comment on whether we should amend Section 32.27 to clarify that any video program provider that is considered, because of a LEC's five percent ownership interest, to be a LEC affiliate for purposes of applying video dialtone safeguards will also be considered an "affiliate" for purposes of the affiliate transactions rule.[75]

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regulated under Title VI.

73 47 C.F.R. §§ 64.901-905.

74 47 C.F.R. § 32.27.

75 The telephone affiliate transaction rules apply to transactions with a company that directly or indirectly controls, is controlled by, or is under common control with the operating company. See 47 C.F.R. § 32.9000. A company in which a LEC held a 5 percent ownership interest would not ordinarily fall within this definition. By contrast, the cable rate regulation rules use the five percent benchmark to define an affiliated programmer for the purposes of applying affiliate transaction rules. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a

5. Structural Separation

37. At divestiture, the Commission initially applied the Computer II structural separation requirements to the customer premises equipment (CPE) and enhanced services operations of the BOCs.[76] The Commission removed the structural separation requirement for CPE in 1987.[77] In reaching that decision, the Commission found that the BOCs had a small share of, and could not dominate, the competitive CPE market;[78] that concerns about cross-subsidy and discrimination could be addressed through nonstructural safeguards; and that the net benefits to telecommunications users of allowing the BOCs flexibility in marketing CPE were greater than the net benefits of structural separation.[79]

38. In the Computer III proceeding, the Commission replaced its requirement that BOCs offer enhanced services through separate subsidiaries with a set of nonstructural safeguards. Those nonstructural safeguards were intended to protect against discrimination and cross-subsidization while avoiding the inefficiencies associated with structural separation.[80] Using a cost/benefit analysis, the Commission concluded that, when compared with nonstructural safeguards, the costs of structural

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Uniform Accounting System for Provision of Regulated Cable Service, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527, 4667-68, paras. 269-70 (1994).

76 Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, Report and Order, 95 FCC 2d 1117 (1984) (BOC Separation Order), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), aff'd on recon., FCC 84-252, 49 Fed. Reg. 26056 (1984), aff'd sub nom. North American Telecommunications Ass'n. v. FCC, 772 F.2d 1282 (7th Cir. 1985).

77 Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143 (1987) (BOC Structural Relief Order).

78 Id. at 147, paras. 25-26, 28.

79 Id. at 147-48, paras. 29-33.

80 Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 174, at para. 1 (1990).

separation outweighed the benefits.[81] These costs included decreased efficiency, innovation, and service availability. The Commission determined that the provision of enhanced services on an integrated basis would allow BOCs to capture certain efficiencies, and capitalize on economies of scope and cost savings created by removing the need for duplicative personnel for sales, marketing, repair and installation, and research and development. In addition, the Commission believed that structural separation was an unnecessary government intrusion into business judgments regarding corporate organization.[82]

39. We seek comment on whether our approach to these questions should differ when BOCs provide video programming. Specifically, we seek comment as to whether there are aspects of the video programming business that warrant our treating BOC provision of video programming differently from the way we treat BOC provision of CPE and enhanced services generally. We also seek comment on whether any structural separation requirement should apply to LECs other than the BOCs. Commenting parties should specifically identify what aspects warrant different treatment, and what form of separation would be appropriate. Parties should also offer information concerning the relative costs and benefits of structural separation.

6. Pole Attachments

40. The Commission has long been concerned that telephone companies would use their control over poles and conduit space to disadvantage their competition. Section 63.57 of our rules requires LECs seeking to provide channel service to show in their Section 214 applications that the cable system for which they would be providing channel service had pole attachment rights or conduit space available "at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator."[83] This rule is intended to prevent LECs from

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81 BOC Safeguards Order at 7614, para. & n.169.

82 BOC Safeguards Order at 7624, para. 108.

83 See 47 C.F.R. § 63.57. See also Video Dialtone Reconsideration Order at para. 285. We are aware of the pendency of several complaints alleging that LECs proposing to construct video dialtone systems are charging cable operators unreasonable rates. See, e.g., Chronicle Publishing Company v. GTE Hawaiian Telephone Company (GTE Hawaii), Complaint and Request for Declaratory Ruling, P.A. No. 95-001 (filed October 7, 1994) and Jones Spacelink of Hawaii, Inc. v. GTE Hawaii, Complaint and Request for Declaratory Ruling, P.A. No. 95-002 (filed October 24,

foreclosing competition by denying cable systems reasonable access to their pole or conduit space.[84]

41. In the Third Further Notice, the Commission sought comment on whether a similar rule should apply to LECs providing video dialtone service. We now seek additional comment on that proposal in light of C&P Tel. Co. v. U.S and U S West v. U.S. Parties should address whether incentives to abuse control over pole and conduit space are increased if a LEC decides to offer video programming within its telephone service area. In addition, as requested in the Third Further Notice, advocates of such a rule should propose specific language, and should explain how the rule would prevent anticompetitive conduct.

7. **Legal and Constitutional Issues**

a. **Waiver of the Cross-Ownership Ban**

42. Section 533(b)(4) of the Communications Act[85] provides that, upon a "showing of good cause," the Commission may waive the 1984 Cable Act's cross-ownership ban. Under Section 533(b)(4), a waiver "shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection."[86] In GTE California, Inc. v. FCC, the United States Court of Appeals for the Ninth Circuit found moot a case in which the FCC had rescinded a waiver granted under Section 533(b)(4).[87] In the course of so holding, and in response to GTE's argument that the waiver should not have been rescinded because Section 533(b) is unconstitutional, the Ninth Circuit stated that "GTECA did not present the constitutional issue to the Commission at a point in this proceeding where it could have tried to obviate the constitutional question by granting discretionary relief, such as a permanent waiver."[88]

43. In GTE California v. FCC, the Ninth Circuit raises the question whether the Commission may establish conditions under

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1994).

84 Video Dialtone Reconsideration Order at para. 285.

85 47 U.S.C. § 533(b)(4).

86 Id.

87 See GTE California v. FCC, 39 F.3d at 942.

88 Id. at 946.

which it will waive the telco-cable cross-ownership ban in order to obviate potential constitutional difficulties. For example, the Commission may decide to authorize any telephone company to provide video programming, whether or not it has obtained an injunction, if it complies with the safeguards we will establish in this proceeding. Our tentative conclusion is that such a reading of Section 533(b)(4) is consistent with the terms of the statute. "Good cause" is commonly interpreted to include changed circumstances, and the circumstances that led us to institute the cross-ownership rule in 1970 have changed dramatically. The cable industry is no longer a fledgling industry. Instead, as the Supreme Court recently recognized, "Congress found that over 60 percent of the households with television sets subscribe to cable . . . and for those households cable has replaced over-the-air broadcast television as the primary provider of video programming."[89]

44. We also tentatively conclude that the safeguards we will establish will constitute "particular circumstances . . ., taking into account the policy" of Section 533(b), under which waivers are warranted. We do not intend to waive the telco-cable cross-ownership rule altogether, so that telephone companies may purchase cable companies that do not face competition and offer their own programming via a monopoly cable system. Rather, and in fulfillment of the policy underlying Section 533(b), we intend to promote competition in the multi-channel video programming market by establishing particular conditions under which telephone companies may establish video dialtone systems that will compete with existing cable operators, thus providing consumers with a choice of multi-channel video systems.

45. The United States Court of Appeals for the District of Columbia Circuit recognized, in NCTA v. FCC (1990), that "the policy of this subsection is to promote competition."[90] However, in that decision the D.C. Circuit also appeared to give a narrow reading to the scope of the waiver provision. Specifically, the court of appeals remanded a decision in which the Commission had granted a waiver because the court concluded that the Commission had not shown that the participation of an affiliate of a telephone company in constructing transmission facilities was "essential to the success" of an experimental video programming project.[91] But at that time no court had declared Section 533(b) unconstitutional, and the D.C. Circuit did not consider whether a

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89 Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2454 (1994).

90 NCTA v. FCC (1990), 914 F.2d at 287.

91 Id. at 289.

broader reading of Section 533(b)(4) was appropriate to render the provision constitutional. The Supreme Court has recently reiterated that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[92] A reading of the waiver provision that authorizes telephone companies that comply with the safeguards we will establish to provide video programming should render Section 533(b) constitutional, because in those circumstances any burden on speech by telephone companies will be minimal. Hence, under U.S. v. X-Citement Video, a broad interpretation of Section 533(b)(4) seems warranted. We seek comment on these tentative conclusions.

b. Constitutionality of Proposed Safeguards

46. As the Court of Appeals for the Fourth Circuit stated in C&P Tel. Co. v. U.S., in order for a content-neutral government regulation of speech, such as the cross-ownership ban, to be constitutional, that regulation must be "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information."[93] The court determined that the government's interests in promoting competition and in facilitating the availability of multiple information sources are significant. The court decided, however, that the ban against telephone companies operating as cable service providers was not narrowly tailored and that there were available less burdensome alternatives to the ban.[94] The court observed that the Commission had already identified one possible alternative in its recommendation to Congress regarding repeal of the ban: Congress could limit the telephone company to a fixed percentage of available channels, while requiring the remainder of channels to be made available to others on a common carrier basis.[95] Finally,

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92 United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467 (1994) (U.S. v. X-Citement Video).

93 C&P Tel. Co. v. U.S. slip op. at 31 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

94 C&P Tel. Co. v. U.S. slip op. at 38.

95 Id. at 38-39 & n.34 (citing Video Dialtone Reconsideration Order). While the court discussed the availability of options less burdensome than the cross-ownership ban, it did not address the constitutionality of any such alternative. The court cited the alternative "not to imply its constitutionality, but only to show [the ban] itself is unconstitutional." Id. at 39 n.34.

the court determined that, under the ban, there did not exist for telephone companies ample alternative methods of communication.[96]

47. In U S West v. U.S., the Court of Appeals for the Ninth Circuit agreed with the Fourth Circuit that (assuming it served a significant government interest) the ban was not sufficiently narrowly tailored. The court found that the evidence submitted by U S West demonstrated that the procompetitive goals of the ban can be "achieved through a variety of less speech-restrictive means."[97] Unlike the Fourth Circuit, however, the Ninth Circuit, determining that it was unnecessary to do so, did not reach the issue of the availability of "ample alternative channels of communication."[98]

48. With respect to all proposals set forth above for safeguards on LEC provision of video programming, we seek comment on whether such safeguards, whether individually, or in any combination, would be consistent with the First Amendment, the Fourth Circuit's decision in C&P Tel. Co. v. U.S., and the Ninth Circuit's decision in U S West v. U.S.

IV. EX PARTE PRESENTATIONS

49. This Fourth Further Notice of Proposed Rulemaking is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

50. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Initial Regulatory Flexibility Analysis with respect to the Fourth Further Notice of Proposed Rulemaking is as follows:

51. Reason for Action: The Commission is issuing this Fourth Further Notice of Proposed Rulemaking to consider whether additional or modified safeguards and rule changes may be necessary or appropriate in the context of the video dialtone regulatory framework, when a telephone company provides video programming directly to subscribers in its telephone service area.

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96 Id. at 40.

97 U S West v. U.S. slip op. at 15910.

98 Id. at 15913.

52. Objectives: The objective of the Fourth Further Notice of Proposed Rulemaking is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

53. Legal Basis: The Fourth Further Notice of Proposed Rulemaking is adopted pursuant to Sections 1, 2, 4, 201-205, 215, 218, 220, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201-205, 215, 218, 220, and 303(r).

54. Description, potential impact, and number of small entities affected: Any rule changes that might occur as a result of this proceeding could impact entities which are small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis. The Secretary shall send a copy of this Fourth Further Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, et seq.

55. Reporting, recordkeeping, and other compliance requirement: None.

56. Federal rules which overlap, duplicate or conflict with the Commission's proposal: None.

57. Any significant alternatives minimizing impact on small entities and consistent with state objectives: The Fourth Further Notice of Proposed Rulemaking seeks comment on a variety of alternatives.

58. Comments are solicited: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Fourth Further Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq.

VI. COMMENT FILING DATES

59. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before March 6,

1995, and reply comments on or before March 21, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554, with a copy to Peggy Reitzel of the Common Carrier Bureau, Room 544, and James Yancey of the Cable Services Bureau, Room 408C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C.

VII. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 215, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, and 220, a FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking

The Commission, in this Fourth Further Notice of Proposed Rulemaking (Notice) commences a proceeding to consider the adoption of rules governing telephone companies' provision of video programming directly to their video dialtone subscribers. This action is in response to recent court decisions, such as the Fourth Circuit decision in C&P Tel. Co. v. FCC.[1] In that decision, the U.S. Court of Appeals held that the cross-ownership ban established by the Cable Communications Policy Act of 1984 violates the First Amendment rights of telephone companies because the ban is not "narrowly tailored to serve a significant government interest." Among many issues, this Notice seeks comment on (1) a tentative conclusion that telephone companies should be allowed to become programmers on their own video dialtone platforms, subject to appropriate safeguards, and that, in light of the public interest benefits of video dialtone, the Commission should not ban telephone companies from providing their own video programming over their own video dialtone platforms; (2) whether the Commission has authority to require telephone companies that wish to provide video programming directly to subscribers in their own service areas to do so over a video dialtone system and not over a traditional cable television facility; and (3) the extent to which Title II and Title VI of the Communications Act, which govern common carrier and cable services, respectively, should apply to telephone companies in their provision of video programming to subscribers.

My support for the development of video dialtone has been based on several principles, including (1) establishing a regulatory framework that could provide incentives for additional facilities-based competition for video programming services, and (2) providing

[1] Chesapeake & Potomac Tel. Co. of Virginia v. United States, No. 93-2340 (4th Cir.Nov. 21, 1994); U.S. West, Inc. v. United States, No. CV-93-01523-BJR (9th Cir. December 30, 1994).

regulatory incentives for telephone company investment in network modernization.[2] I also have observed that our consideration of video dialtone issues should reflect the shifting competitive and regulatory environment in the multichannel video marketplace.[3] I write separately regarding this Notice, therefore, in order to highlight my interest in certain competitive issues in the marketplace for multichannel video programming as well as for broadband services that arise as the Commission initiates the process to enable telephone companies to provide video programming directly to their video dialtone subscribers. Most fundamentally, while I underscore my support for video dialtone as a major step in the regulation of converging industries,[4] I believe it is important to remain careful in addressing the tendency toward the "cablizing" of video dialtone systems. In our recent reconsideration of the regulatory framework governing video dialtone, with respect to the Commission's decision to reject the "anchor programmer" structure, I observed that allowing video programmers such wide latitude to participate in the operation of the basic video dialtone platform would heighten the risk of discrimination in the provision of programming services.[5] To the extent that economic or marketing considerations would create incentives to rely primarily on a single programmer, I also expressed concerns that results of an anchor programmer structure would be more consistent with "cable" service rather than the common carrier obligations under Title II of the Communications Act.

I question, therefore, whether many similar public policy issues are raised now as we consider the rules governing telephone companies as they provide video programming directly to their subscribers as programmers on their video dialtone platforms.
If similar policy questions are raised in this context, I especially am interested in comments regarding how the Commission may resolve these policy questions with some degree of consistency, recognize the evident incentives for local exchange carriers to structure their video dialtone systems in many ways like a cable system, and yet maintain the distinct role of video dialtone as a common carrier service. For instance, we now face questions including whether to apply Title II or Title VI to a LEC's video dialtone system where it serves as a programmer, and whether to require the LEC to pursue a franchise from local

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[2] See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63-58 (CC Docket No. 87-266), Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) ("Second Report and Order")(Separate Statement of Commissioner Andrew C. Barrett).

[3] See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63-58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, released November 7, 1994 ("Memorandum Opinion and Order") (Separate Statement of Commissioner Andrew C. Barrett).

[4] See Second Report and Order (Separate Statement of Commissioner Andrew C. Barrett); Order and Authorization, New Jersey Bell Telephone Company video Dialtone Application (Dover Township, NJ), FCC 94-180, (released July 18, 1994)(Separate Statement of Commissioner Andrew C. Barrett); and Memorandum Opinion and Order (Separate Statement of Commissioner Andrew C. Barrett).

[5] See Memorandum Opinion and Order (Separate Statement of Commissioner Andrew C. Barrett).

authorities for its video dialtone system. In this context, and in response to recent court decisions, I am interested in comments that address ways in which the Commission can maintain a common carrier model for video dialtone systems, and avoid potential regulatory disparities and competitive inequities in the multichannel video marketplace.

I also have previously stated that the Commission's decision to continue along the path of authorizing video dialtone service is a fundamental step toward replacing the function of cable rate regulation with competitive constraints in the multichannel video marketplace.[6] In doing so, I am concerned that those competitive constraints must be founded on a policy that avoids regulatory disparities among potential competitors. This proceeding poses an array of questions, and the Commission's answers to those questions will determine the extent to which a truly competitive marketplace for multichannel programming and broadband services will emerge. Thus, in this proceeding, and as a result of the concurrent decision to grant Bell Atlantic's 214 application for the northern Virginia market trial subject to the policies determined in this proceeding,[7] I am concerned that we may already need to consider issues beyond the immediate questions regarding telephone companies' provision of programming on their video dialtone systems as we are simultaneously generating another range of issues concerning the competitive role of cable operators in responding to the advent of video dialtone systems. For example, where a cable company is able to obtain approval from state authorities to provide local exchange service in a community where they already provide what we regard as "cable television service", I would question how we should respond to requests from the company if it seeks to be regulated under Title II as a "video dialtone system", particularly if it finds those regulatory provisions more favorable?

Furthermore, as the Commission moves forward in the context of an important new aspect of developing a regulatory framework for video dialtone systems, I am concerned that we uphold our responsibilities to address a number of other parallel issues in a manner that provides a similar measure of flexibility, where necessary. As I previously have observed, given that this proceeding embodies a measure of flexibility for LECs in providing programming through video dialtone systems, I still will be interested in the Commission's actions to provide substantial flexibility to cable operators in order to augment the cable rate

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[6] See Second Report and Order, (Separate Statement of Commissioner Andrew C. Barrett).

[7] In the Commission's separate decision to grant Bell Atlantic's application to commence a six-month market trial of video dialtone service in Arlington, Virginia, the Commission also granted Bell Atlantic's proposal to allow its affiliate, Bell Atlantic Video Systems (BVS), to provide video programming via the Bell Atlantic video dialtone platform. In addition to requiring Bell Atlantic to comply with various safeguards, the Commission also stated that Bell Atlantic would be required to comply with any additional safeguards that the Commission might adopt in future proceedings, including this rulemaking. See In the Matter of the Application of the Chesapeake and Potomac Telephone Company of Virginia, For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities to test a new technology for use in providing video dialtone within a geographically defined trial area in northern Virginia, Order and Authorization, (January 12, 1994).

regulations.[8] To that end, among several considerations, I would suggest that we may need to establish final cost-of-service rules as well as standards for cable operators to allocate costs and to pursue incentives to upgrade their distribution networks to provide voice services, improved video services, or other broadband services.

[8] See Memorandum Opinion and Order (Separate Statement of Commissioner Andrew C. Barrett).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Telco Programming on Video Dialtone Networks (CC Docket No. 87-266)

I have been -- and I remain -- an enthusiastic supporter of video dialtone. I fully subscribe to the notion that VDT can interject needed competition into the video transport market, stimulate desirable investment in the telecommunications infrastructure, and promote the availability of new programming services. Consumers can reap substantial benefits from a common carrier-based video delivery system, with multiple customer-programmers competing with each other as well as with video programmers using other delivery media.

We begin today to grapple with complex issues of constitutional and statutory analysis that go beyond the web of policy considerations involved in our prior video dialtone decisions. Heretofore, a central tenet of our video dialtone regime was the notion that local exchange carriers were to provide only a transparent conduit, with the role of "customer-programmer" played entirely by unaffiliated entities. We are now contemplating a significant change in that aspect of the VDT framework.

We are brought to the present situation by a series of judicial decisions regarding the First Amendment rights of local exchange carriers. Two circuit courts, as well as district courts in three other jurisdictions, have now held that the cable-telco cross-ownership provisions of the 1984 Cable Act are unconstitutional. This rulemaking ensures that we will consider the full range of issues flowing from these judicial decisions.

For example, we need to consider whether we can or should or must enable the telephone companies to serve as customer-programmers on their own VDT platforms. We need to think through carefully what statutory and regulatory provisions will attach to such activities. We also need to step back, review the big picture, and confirm that our decisions enhance the prospects for vigorous, sustainable, and fair competition.

I am increasingly inclined to believe that consumer benefits can result from permitting carriers to provide video programming on their own VDT platforms. I further believe we can craft safeguards that protect consumers and independent video programmers. I look forward to considering the responses of interested parties to the Notice and to completing this new phase of the rulemaking as quickly as we can -- with due regard for the complexity and the importance of the issues before us.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking (CC Docket No. 87-266)

In October of last year, I joined my colleagues in voting to affirm and clarify the Commission's video dialtone rules. That action on reconsideration underscored this Commission's firm commitment to regulatory policies designed to enhance competition in the delivery of video services to consumers. The video dialtone rules provide a regulatory framework that permits telephone companies to compete as common carriers in the market for multichannel video services. Consistent with the telephone company-cable television cross-ownership ban enacted by Congress in the 1984 Cable Act,[1] our video dialtone rules currently do not permit telephone companies to provide video programming directly to subscribers over their own common carrier video dialtone platforms.[2]

Recent judicial decisions have struck down the statutory cross-ownership ban as violative of telephone companies' First Amendment rights to speak via video programming within the area served by their common carrier transmission networks.[3] With these court opinions in hand, telephone companies now seek to furnish video programming over their video dialtone platforms, alongside competing unaffiliated video information providers. Thus, telephone companies seek authority to not only provide transmission facilities for video programming but to control the content of that programming over their own facilities in their role as video information providers. The legal landscape upon which video dialtone was conceived has shifted. As a consequence, video dialtone service and traditional cable television service may no longer seem, as one court observed, like "very different creatures."[4]

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[1] 47 U.S.C. § 533(b).

[2] 47 C.F.R. § 63.54(d)(2) (1993).

[3] See, e.g., Chesapeake & Potomac Tel. Co. of Virginia v. United States, No. 93-2340 (4th Cir. Nov. 21, 1994); U S West, Inc. v. United States, No. CV-93-01523-BJR (9th Cir. Dec. 30, 1994).

[4] National Cable Television Ass'n v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994).

Due to these developments, we now address complex and important legal and public policy issues. We ask how telephone company provision of video programming over video dialtone platforms should be regulated in the public interest. Should the Title II common carrier provisions of the Communications Act govern exclusively? What relevance does or should Title VI of the Act, governing cable communications, have in this context? Should some, but not all, provisions of Title VI apply in these circumstances? And how can we resolve these regulatory questions with fidelity to the judicially-recognized First Amendment rights of telephone companies? These are some (though certainly not all) of the questions we must grapple with, and resolve, in the months ahead.

The communications world has undergone dramatic transformation since 1934, when the basic elements of Title II became law; since 1984, when Congress codified much of Title VI and enacted the statutory cross-ownership ban; and indeed even in the last two years since Congress amended Title VI by enacting the Cable Act of 1992.[5] As I noted in my separate statement to the video dialtone reconsideration order, I look forward to a day "when any entity can enter any sector of the communications market and compete according to the same ground rules."[6] To achieve that goal, we must strive for open communications markets, robust and fair competition, and regulatory parity to the extent possible.

Members of Congress have recognized that these converging communications services no longer fit neatly into the existing titles of the Communications Act and are actively considering changes to the statute. While Congress debates statutory reform, I believe we must forge ahead and address these challenging issues. We should strive to reach the best public interest result we can, consistent with existing law. I urge all interested parties to join in this critical debate and assist us in our task by filing detailed comments that help us resolve these issues.

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[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[6] See Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 (released Nov. 7, 1994) (Separate Statement of Commissioner Rachelle B. Chong at 5).

Before the
FEDERAL COMMUNICATIONS COMMISSION **FCC 95-21**
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11	)	
and 13 of the Cable Television	)	
Consumer Protection and	)	MM Docket No. 92-264
Competition Act of 1992	)	
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership Limitations	)	
and Anti-Trafficking Provisions	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Adopted: January 12, 1995 Released: January 30, 1995

By the Commission:

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I. INTRODUCTION

1. In the *Report and Order and Further Notice of Proposed Rule Making*[1] in this proceeding (the "*First Report & Order*"), we adopted rules implementing the cross-ownership and anti-trafficking provisions of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[2] We address herein petitions for reconsideration of that *First Report & Order*.[3]

2. In the *First Report & Order*, we adopted a rule that prohibited cable system operators from acquiring satellite master antenna television ("SMATV") systems within their actual service areas.[4] On reconsideration, we find that such a prohibition is inconsistent with the statutory provision upon which it was based. Consequently, we herein revise that part of our rules that governs cable operators' ownership of SMATV systems within their franchise areas. We believe our analysis in this order on reconsideration, and our determination to revise the ownership rules we adopted in June of 1993, more accurately reflect the intent of Congress and comport with the meaning of Section 613(a)(2) of the Communications Act of 1934, as amended by the 1992 Cable Act (the "Communications Act").[5]

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[1] *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), Report & Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 6828 (1993) (MM Docket No. 92-264).

[2] Pub. L. No. 102-385, secs. 11, 13, 106 Stat. 1460, 1486-89 ("1992 Cable Act").

[3] Also pending before us are petitions for reconsideration of the horizontal and vertical ownership rules that were adopted in the *Second Report and Order* in this proceeding. *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits), Second Report & Order*, 8 FCC Rcd 8565 (1993), *recon. pending* (MM Docket No. 92-264). Those petitions will be addressed in subsequent orders.

[4] *First Report & Order* ¶¶ 113-129, 8 FCC Rcd at 6844-47.

[5] 47 U.S.C. § 533(a)(2).

3. We further affirm our decision in the *First Report & Order* to adopt a regulatory framework implementing the anti-trafficking provision of Section 13 of the 1992 Cable Act, finding that our rules fulfill Congress' mandate and are consistent with the goal of promoting competition in the multichannel video marketplace. We take this opportunity, however, to clarify the manner in which those rules apply to various transactions.

4. Section 11(a) of the 1992 Cable Act amended the Communications Act by adding an ownership provision restricting multichannel multipoint distribution service ("MMDS") and SMATV ownership interests by cable operators.[6] That provision, now Section 613(a)(2) of the Communications Act, prohibits a cable operator from holding a license for MMDS, or from offering SMATV service that is separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system.[7] It grandfathers all such service in existence as of the date of enactment of the 1992 Cable Act,[8] and authorizes the Commission to waive the requirements of the provision to the extent necessary to ensure that all significant portions of a franchise area are able to obtain video programming.[9]

5. Section 13 of the 1992 Cable Act amended the Communications Act by establishing a three-year holding requirement for cable systems (the "anti-trafficking provision").[10] That provision, now Section 617 of the Communications Act, restricts the ability of a cable operator to sell or otherwise to transfer ownership in a cable system within thirty-six months following either the acquisition or initial construction of the system by such operator.[11] It also delineates specific exceptions to the general rule and provides waiver authority to the Commission.[12]

6. In the *First Report & Order*, we adopted rules implementing the ownership and

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[6] 1992 Cable Act sec. 11(a) (amending the Communications Act § 613, 47 U.S.C. § 533).

[7] 47 U.S.C. § 533(a)(2).

[8] Communications Act § 613(a)(2)(A), 47 U.S.C. § 533(a)(2)(A); *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), Erratum*, 8 FCC Rcd 6884 (1993) (MM Docket No. 92-264).

[9] Communications Act § 613(a)(2)(B), 47 U.S.C. § 533(a)(2)(B).

[10] 1992 Cable Act sec. 13 (amending the Communications Act § 617, 47 U.S.C. § 537).

[11] 47 U.S.C. § 537.

[12] 47 U.S.C. §§ 537(c), (d).

anti-trafficking provisions of the 1992 Cable Act.[13] In particular, we: (a) revised the existing MMDS-cable cross-ownership rules;[14] (b) adopted SMATV ownership rules;[15] and (c) adopted rules implementing the statutory anti-trafficking provision.[16]

7. In this *Memorandum Opinion and Order* (the "*MO&O*"), we address the various petitions for reconsideration and/or clarification, oppositions and replies that have been filed with respect to those ownership and anti-trafficking rules.[17] For the reasons stated below, we clarify and modify the regulations adopted in the *First Report & Order* in several respects. These modifications are in furtherance of the statutory objectives of the 1992 Cable Act, and are consistent with our intent to eliminate artificial regulatory barriers to competitive and efficient delivery of multichannel programming services to the American public. In addition to responding to the parties' petitions, we take this opportunity to clarify several matters that have arisen during the course of our administration of those regulations.

8. First, with respect to the SMATV ownership rules, we remove the prohibition against cable operators' acquisitions of SMATV systems within their actual service areas based upon a revised interpretation of the language of Section 11(a) of the 1992 Cable Act. Second, we affirm that any SMATV system owned by a cable operator within the operator's franchise area must be operated in accordance with the terms and conditions of the local franchise agreement. We conclude that our revised rules are more fully supported by the statute and Congressional statements of intent than were the rules adopted in the *First Report & Order*. We further find, based on the record before us, that the policy of promoting competition to traditional coaxial cable systems is at least as well served, if not better served, by the revisions we make today.

9. With respect to anti-trafficking, we first affirm the Commission's rules regarding action by franchise authorities on requests for approval of transfers or assignments of cable systems that have been held for three or more years. Second, we clarify certain aspects of FCC Form 394. Third, we clarify that a franchise authority may require approval of cable system transfers or assignments if so required by state or local law. Fourth, we clarify that the holding period does not recommence upon the consummation of a transaction that is exempt from the statutory three-year holding period. Fifth, we clarify certain aspects of calculating the holding period. Sixth, we affirm our decision to grant a blanket waiver of the anti-trafficking rules to small systems. Finally, based on our experience to date, we

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[13] *First Report & Order*, 8 FCC Rcd 6828.

[14] *Id.* at ¶¶ 5, 97-112, 8 FCC Rcd at 6829, 6842-44; 47 C.F.R. § 21.912.

[15] *Id.* at ¶¶ 6, 113-129, 8 FCC Rcd at 6829, 6844-47; 47 C.F.R. § 76.501(d)-(e).

[16] *Id.* at ¶¶ 3-4, 9-91, 8 FCC Rcd at 6829-6841; 47 C.F.R. § 76.502.

[17] See Appendix A for a list of parties participating in this proceeding.

conclude that in the future we will generally look favorably on requests for waiver of the anti-trafficking rules unless the request raises serious concerns on its face or any objections we receive to grant of the waiver provide evidence of other public interest bases for concern.

II. STATUTORY SMATV OWNERSHIP RESTRICTIONS

10. *Overview.* SMATV systems (also known as "private cable systems") are multichannel video programming distribution systems that serve residential, multiple-dwelling units ("MDUs"), and various other buildings and complexes.[18] A SMATV system typically offers the same type of programming as a cable system, and the operation of a SMATV system largely resembles that of a cable system -- a satellite dish receives the programming signals, equipment processes the signals, and wires distribute the programming to individual dwelling units. The primary difference between the two is that a SMATV system typically is an unfranchised, stand-alone system that serves a single building or complex, or a small number of buildings or complexes in relatively close proximity to each other.[19]

11. A SMATV system is defined under the Communications Act by means of an exception to the definition of a cable system:

> (7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment . . . but such term does not include . . . (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; . . . .[20]

Therefore, a SMATV system is different from a cable system only in that it does not use "closed transmission paths" to: (a) serve buildings that are not commonly owned, controlled, or managed; or (b) use a public right-of-way.

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[18] *See Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), First Report* (hereinafter the "*1994 Competition Report*") ¶ 92, 9 FCC Rcd 7442, 7488-89 (1994) (CS Docket No. 94-48).

[19] We note that SMATV operators are permitted to use microwave facilities to interconnect properties. *Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, Report & Order*, 6 FCC Rcd 1270, 1272 (1991) (PR Docket No. 90-5).

[20] Communications Act § 602(7), 47 U.S.C. § 522(7).

12. Thus, the distinction between a SMATV system and a cable system is based on the limited manner in which a SMATV system provides its services. When the service is no longer so limited, the SMATV system ceases to be eligible for the statutory exception set forth in Section 602(7)(B) and becomes a cable system.[21] If a system's lines interconnect separately owned and managed buildings or if the system's lines use public rights of way, the system is a cable system for purposes of the Communications Act.[22] Closed transmission path interconnection of a cable system and a SMATV system will, therefore, cause the SMATV system to become a part of the cable system.

13. Section 613(a)(2) of the Communications Act makes it "unlawful for a cable operator . . . to offer satellite master antenna television service *separate and apart* from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system."[23] In the *First Report & Order*, we interpreted this provision as restricting franchised cable operators from acquiring existing SMATV systems within their actual service areas. We concluded, however, that Section 613(a)(2) does not prohibit all SMATV-cable cross-ownership within cable operators' actual service areas.[24] In particular, we determined that cable operators are permitted to construct stand-alone or integrated SMATV systems in their actual service areas, provided such SMATV service is offered in accordance with the terms and conditions of agreements with the local franchise authorities.[25] We found that common ownership of a SMATV system that itself qualifies as a "cable system under Section 602(7)(B) of the Communications Act and a separate stand-alone SMATV system" would also be permitted.[26] We also determined that a cable operator is permitted to acquire,

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[21] *Definition of a Cable System, Report & Order ("Definition of a Cable System")*, 5 FCC Rcd 7638 (1990), *upheld in FCC v. Beach Communications, Inc.*, ___ U.S. ___, 113 S. Ct. 2096 (1993) (*prior and subsequent history omitted*).

[22] *Id.*

[23] Communications Act § 613(a)(2), 47 U.S.C. § 533(a)(2) (emphasis added).

[24] *First Report & Order* ¶ 119, 8 FCC Rcd at 6845.

[25] *Id.* ¶¶ 6, 122, 8 FCC Rcd at 6829, 6845-46. The term "integrated SMATV system" is a misnomer. It was used in that part of the *First Report & Order* to describe a cable headend and wiring in a MDU that had at one time qualified for the SMATV exception, but no longer qualified for that exception due to interconnection with a cable system.

[26] *Id.* ¶¶ 95, 128, 8 FCC Rcd at 6842, 6846-47, *relying on Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 92, 102d Cong., 1st Sess. 81 (1991) ("*Senate Report*"). We recognize that a SMATV system cannot simultaneously qualify as both a cable system and a SMATV system because, as explained *supra* at paras. 11-12, a SMATV system is defined as an exception to the definition of a cable system. *See e.g., Definition of a Cable System* ¶ 5, 5 FCC Rcd at 7638.

or build, a stand-alone SMATV system located in the unserved portions of the franchise area, provided such cable-owned SMATV system is operated in accordance with the terms and conditions of the cable franchise agreement.[27]

14. However, we further determined that a cable operator would not be allowed to acquire existing SMATV facilities within the cable operator's actual service area for the purpose of providing cable service.[28] In reaching this conclusion we observed that in "light of the important statutory objectives of promoting competition and encouraging diverse sources of programming," such acquisitions would undermine the goals of a provision that we viewed as a traditional cross-ownership restriction and "eliminate an important potential source of competition for established cable operators."[29] We concluded that allowing cable operators to acquire existing SMATV facilities would undermine competition between cable operators and SMATV providers, reinforce existing cable monopolies, and reduce competitive opportunities for SMATV providers within the cable service area.[30]

A. Cable Operators' Acquisitions of Existing SMATV Systems

15. *Pleadings*. Several parties argue that it was an error to prohibit cable operators from acquiring existing SMATV systems within their service areas.[31] Those parties generally assert that the ban on such acquisitions is not supported by the 1992 Cable Act or overall Congressional objectives. In fact, Time Warner Entertainment Company, L.P., ("Time Warner") believes it is significant that parties from both the cable television and SMATV industries share this belief.[32]

16. The National Private Cable Association, MSE Cable Systems, Cable Plus and Metropolitan Satellite (hereinafter referred to collectively as "NPCA") and Time Warner argue that so long as the cable operator offers SMATV service that is not "separate and

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[27] *First Report & Order* ¶¶ 6, 127, 8 FCC Rcd at 6829, 6846.

[28] *Id.* ¶ 123, 8 FCC Rcd at 6846.

[29] *Id.*

[30] *Id.*

[31] *See* Reply Comments filed by Cablevision Systems Corporation ("Cablevision Reply Comments") at 2; Reply Comments filed by The National Cable Television Association ("NCTA Reply Comments") at 2; Consolidated Comments filed by Time Warner Entertainment Company, L.P. Concerning Petitions for Reconsideration and Clarification ("Time Warner Comments") at 2; and Joint Petition for Reconsideration filed by Multivision Cable TV Corp. and Providence Journal Company ("Multivision Petition") at 4.

[32] Time Warner Comments at 2.

apart" from its franchised service, it is in compliance with the statute, regardless of whether the cable operator acquired or installed the facilities.[33] Although NPCA agrees with the Commission's determination that the "separate and apart" language refers to service that does not comply with local franchise requirements, it argues that the language cannot also be the basis for an unrelated distinction created by the Commission between a cable operator who installs SMATV facilities and a cable operator who acquires such facilities.[34] NPCA maintains that the statute restricts the manner in which a cable operator may offer SMATV service, not the manner in which the cable operator acquires the facilities in order to offer such services.[35]

17. Cablevision Systems Corporation ("Cablevision") and Time Warner both argue that it is not necessary to make a distinction between the acquisition and construction of SMATV systems, or between the served and unserved portions of franchise areas, to ensure competition in the video distribution marketplace (they assert that nothing precludes a second video distributor from offering service to a building).[36]

18. Time Warner and the National Cable Television Association ("NCTA") argue that the Commission's notion that a restriction on cable operator's ability to purchase SMATV systems fosters competition is misplaced because cable operators and SMATV systems usually do not compete once an MDU owner has decided which multichannel video programming distributor ("MVPD") will serve the building.[37] Rather, Time Warner and NCTA contend that competition occurs when MVPDs seek rights from the MDU owner to provide multichannel video programming service within a building, and that once such a contract is entered into, the competitive environment is not adversely affected if a SMATV operator is allowed to sell its business as a going concern to the franchised cable operator.[38]

19. NPCA, Cablevision, Time Warner and NCTA all argue that the Commission's broad acquisition prohibition discourages investment in SMATV operations, and threatens

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[33] Petition for Clarification or, Alternatively, for Reconsideration filed by the National Private Cable Association, MSE Cable Systems, Cable Plus and Metropolitan Satellite ("NPCA Petition") at 10-12; Petition for Reconsideration filed by Time Warner Entertainment Company, L.P. ("Time Warner Petition") at 5.

[34] NPCA Petition at 12.

[35] *Id.* at 11.

[36] Cablevision Reply Comments at 3; Time Warner Comments at 4.

[37] Time Warner Comments at 4; NCTA Reply Comments at 2-3.

[38] *Id.*

their overall viability.[39] NPCA further contends that a SMATV operator who tries to sell one SMATV system may actually be primarily interested in generating the cash necessary to make worthwhile investments in its other properties, thereby increasing the competitive pressure it places on the franchised cable industry as a whole.[40]

20. Taking an even stronger position in their petition, Multivision Cable TV Corporation and Providence Journal Company (hereinafter referred to collectively as "Multivision") argue that when Congress intended to enlarge governmental control over the acquisition of media competitors in the same market, it did so explicitly and precisely, and that no grant of authority was given to the Commission with regard to a cable system's acquisition of SMATV facilities.[41] Multivision points out that the Notice of Proposed Rule Making[42] in this proceeding did not address a possible distinction between the acquisition and construction of SMATV facilities by cable operators, thereby precluding interested parties from having notice of such a distinction or an opportunity to comment.[43] Multivision further notes that none of the commenters argued that cable operators should not be allowed to acquire, as opposed to construct, SMATV facilities.[44]

21. *Discussion*. On reconsideration, we modify our rules based upon a revised analysis of the language of Section 613(a)(2) and the Congressional intent underlying that provision. We also note that our modified rules are consistent with the diversity and competitive considerations associated with the statutory ownership restriction. In light of our action today with respect to cable operators' acquisitions of SMATV systems, Multivision's contention that parties were not provided adequate notice and opportunity for comment on our prior distinction is moot.

22. We begin by reexamining the language of Section 613(a)(2), which provides that a cable operator may not "offer satellite master antenna television service *separate and apart* from any franchised cable service, in any portion of the franchise area served by that

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[39] NPCA Petition at 13; Cablevision Reply Comments at 3; Time Warner Comments at 4; NCTA Reply Comments at 3.

[40] NPCA Petition at 13.

[41] Multivision Petition at 4.

[42] *See Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), Notice of Proposed Rule Making and Notice of Inquiry* (hereinafter the "*NPRM*"), 8 FCC Rcd 210 (1993).

[43] Multivision Petition at 3.

[44] *Id.*

cable operator's cable system."[45] On reconsideration we believe that this language means that a cable operator may not offer SMATV service anywhere in its franchised service area unless such service is offered together with or as part of the cable service provided pursuant to its local cable franchise agreement. In other words, if a cable operator offers SMATV service to subscribers within its franchised service area, it must offer this otherwise unregulated multichannel video programming service to those subscribers pursuant to the same terms and conditions upon which the regulated cable television service is offered to subscribers within that same franchise. Thus, cable operators may not use facilities that meet the statutorily-created SMATV exception to the definition of a cable system to provide multichannel video programming service that does not comply with franchise obligations or the Commission's rules.

23. We do not believe Congress used the words "separate and apart" to require the physical interconnection of commonly-owned cable systems and facilities that would otherwise qualify for the SMATV exception. Rather, the words "separate and apart" refer to the service, not the delivery system, and are used to limit cable operators' ability to offer the unregulated SMATV service. Accordingly, we believe the statutory language requires cable operators to comply with all franchise requirements in their delivery of multichannel video programming without regard to whether any part of the facilities used might qualify as a SMATV system.[46]

24. In the *First Report & Order*, we reviewed the legislative history of the 1992 Cable Act, which reflected Congress' concern that the "common ownership of different media may limit the number of different voices available to the public."[47] Congress believed that certain ownership restrictions were necessary to "enhance competition" and "[t]o further diversity and prevent cable (operators) from warehousing its potential competition."[48] Based on these general policies underlying the 1992 Cable Act, we concluded that Congress intended to prohibit cable operators' acquisitions of SMATV systems within their actual service areas.[49]

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[45] Communications Act § 613(a)(2), 47 U.S.C. § 533(a)(2) (emphasis added).

[46] This construction of Section 613(a)(2) is consistent with that advanced by Time Warner and NPCA in their petitions for reconsideration. Time Warner Petition at 3-5; NPCA Petition at 10-13. It is also the construction advanced by NCTA and NPCA, among others, in comments in response to the original notice of inquiry in this proceeding. *First Report & Order* ¶¶ 114, 120, 125, 8 FCC Rcd at 6844-47.

[47] S. Rep. No. 92, 102d Cong., 1st Sess. 46 (1992); *see First Report & Order* ¶ 121, 8 FCC Rcd at 6845.

[48] S. Rep. No. 92, *supra*, at 47.

[49] *First Report & Order* ¶¶ 121-23, 8 FCC Rcd at 6845-46.

25. However, neither the statutory provision nor the legislative history address the manner in which cable operators obtain the SMATV facilities over which they "offer" service. We believe that, had Congress intended to draw a distinction between the offering of service through a SMATV system that was acquired as opposed to one that was constructed, it would have done so. Indeed, Congress included specific references to construction and acquisition in the anti-trafficking provision of Section 13 of the 1992 Cable Act.[50] It is therefore reasonable to conclude that in the context of the SMATV provision, Congress was unconcerned with the manner in which SMATV systems are obtained by cable operators and was mostly concerned with the manner in which such service is "offered" to subscribers in the cable operator's franchised service area; i.e., "separate and apart from any franchised cable service." Accordingly, on further analysis we conclude that revising our rule to eliminate the regulatory distinction between the acquisition and construction of SMATV systems accurately and appropriately interprets the statutory provision.

26. We further believe the revisions we adopt in this *MO&O* more closely comport with Congressional intent in enacting the SMATV ownership restriction. Our current interpretation of the statute is consistent with language in the report of the committee of conference that accompanied the 1992 Cable Act (the "Conference Report"), and in the report of the Senate Committee on Commerce, Science and Transportation that accompanied the Senate bill containing the provision that was ultimately adopted and included in the 1992 Cable Act (the "Senate Report"). The conference committee wrote that the final bill contained the relevant Senate provision,[51] and that the Senate provision "amends Section 613(a) . . . by adding a new paragraph (2) which prohibits a cable operator from owning . . . a satellite master antenna television service (SMATV) in the same areas in which it holds a franchise for a cable system."[52] The Senate Report contains the same explanation of the provision.[53]

27. We believe that Congress's intent to preclude franchised cable operators from owning SMATV services in their franchise areas was not directed at the technology involved, which is simply a cable headend that is not interconnected by wire with a building that is separately-owned or with property on the other side of a public right-of-way.[54] Cable operators may use facilities that could otherwise qualify for the SMATV exception to provide

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[50] 1992 Cable Act sec. 13, 47 U.S.C. § 537.

[51] H.R. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992).

[52] H.R. Rep. No. 862, *supra*, at 81.

[53] S. Rep. No. 92, *supra*, at 46.

[54] *Supra* paras. 10-12.

franchised cable service to hotels, MDUs or large apartment complexes.[55] Rather, we believe that the conference committee's statement that cable operators would not be permitted to own SMATV service within their franchise areas meant that they cannot use the SMATV exception to offer service that does not comply with federal law and franchise obligations.

28. We continue to believe that the language of the statute, as supported by the conference committee's statement prohibiting a cable operator from owning a SMATV "in the same areas in which it holds a franchise for a cable system," evidences Congress's intent to prohibit SMATV-cable cross-ownership by requiring that a cable operator's offer of multichannel video programming throughout the entire franchise area be made only pursuant to the terms and conditions of its franchise agreement. This interpretation ensures competitive opportunities for SMATV operators and is consistent with the interpretation proffered in the *First Report & Order* where we also required cable operators to comply with the terms and conditions of their franchise agreements if they offered multichannel video programming services through SMATV facilities in the unserved portions of their service areas.[56] Thus, we believe our interpretation accurately reflects Congressional intent and properly promotes the underlying statutory goals of promoting competition throughout the franchise area.

29. We further believe that the revisions we adopt today are consistent with the overall policy goals of the 1992 Cable Act. For example, we believe diversity continues to be preserved and promoted through a number of regulatory rules implementing the 1992 Cable Act, including the program access and carriage rules, must carry, and franchise requirements. The revisions we adopt today that permit cable operators to acquire SMATV systems in their franchised service area are also consistent with the policy goals underlying our decision in the *First Report and Order*.[57]

30. In the *First Report & Order* we concluded that cable operators' acquisitions of SMATV systems within their service areas would eliminate an important potential source of competition for established cable operators. In reaching that conclusion, we viewed existing SMATV systems as engaged in direct competition with incumbent cable systems.[58] On

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[55] *See, e.g., First Report & Order* ¶ 8 FCC Rcd at 6845-46. According to Time Warner, cable operators often use facilities that meet the SMATV exception to the definition of a cable system to provide cable service in accordance with their franchise obligations. *Id.* n.104 (citing Time Warner Comments at 63).

[56] *First Report & Order* ¶ 127, 8 FCC Rcd at 6846.

[57] *Id.* ¶¶ 121, 123, 8 FCC Rcd at 6845-46.

[58] We wrote that cable operators' acquisitions of SMATV systems within their service areas:

(continued...)

reconsideration, we find that the record contains insufficient evidence on which to base an economic analysis as to the workings of the SMATV marketplace and on which to conclude with any degree of certainty that either the rule we adopted in the *First Report & Order* or the revision we adopt today would have particular economic consequences.

31. Notwithstanding our prior recognition that the concern underlying the statutory provision is the preservation and enhancement of competition in the delivery of multichannel video programming, several commenters argued that adverse competitive consequences are engendered by the rule we adopted in the *First Report & Order*. For example, these commenters argue that the availability of capital necessary to construct a SMATV system is often dependent upon the availability of exit strategies, and in particular the ability to recoup sunk costs by being able to sell to a locally-franchised cable operator when that operator is the only potential buyer.[59] The revision we adopt today would eliminate that constraint and level the competitive field for initial entry. We note, however, in view of the inconclusive economic evidence our determination to revise the rule rests on our interpretation of the language of the statute.

32. Accordingly, we reconsider our decision in the *First Report & Order* that cable operators may not acquire SMATV systems located within their service areas, and in this order, modify our rules by permitting cable operators to purchase SMATV systems located within their franchise areas, provided they operate such systems in accordance with the terms and conditions of their local franchise agreements.[60] We therefore eliminate the regulatory

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[58](...continued)

> would undermine the goals of the cross-ownership restriction and eliminate an important potential source of competition for established cable operators. Moreover, we believe that Congress sought to encourage cable operators and SMATV providers to compete directly with one another. In our view, a policy allowing cable operators to acquire existing SMATV facilities, rather than construct their own facilities, would not further this goal and would in fact, thwart the development of a promising competitive technology. Finally, we determine that such a policy would reinforce existing cable monopolies and reduce the competitive opportunities for SMATV providers within the cable service area.

First Report & Order ¶ 123, 8 FCC Rcd at 6846.

[59] NPCA Petition at 13; Time Warner Comments at 4; NCTA Reply Comments at 3.

[60] On the other hand, we deny petitioners' request to reconsider our determination that franchised cable operators must comply with their franchise obligations in the operation of all SMATV systems under their ownership, control or management that are located within their franchise areas. *Infra* paras. 37-40.

distinction drawn in the *First Report & Order* that accorded disparate regulatory treatment based upon distinctions between the construction and acquisition of SMATV systems. We conclude that the revised rule we adopt today is more consistent with and more accurately and appropriately interprets the language of Section 613(a)(2) than the rule adopted in the *First Report & Order*.

B. Cable Operators' Use of SMATV Facilities Within Their Franchise Areas

33. *Pleadings*. With respect to whether "integrated SMATV systems" must comply with the cable system's local franchise requirements, Time Warner argues that because a SMATV system is defined in terms of an exclusion from the "cable system" definition, one system can never constitute both a SMATV and a cable system "as the *Report & Order* erroneously suggests."[61] Once a SMATV loses the SMATV exemption (e.g., by interconnection), Time Warner believes that the SMATV system then becomes a cable system subject to all the regulatory requirements applicable to cable systems.[62] Time Warner goes on to state that stand-alone SMATV systems operated in accordance with local franchise requirements are not providing service that is "separate and apart" from franchised cable service, and are thus not subject to the cross-ownership prohibition.[63]

34. In support of its position, Time Warner cites cases in which the Commission has refused to extend unregulated SMATV status to facilities that serve only single family homes,[64] and a Commission decision finding that interconnected systems that are comprised of a cable system portion and a "SMATV portion" are subject to regulation as cable systems in their entirety.[65] Time Warner further proposes that even where a cable system provides a commonly-owned SMATV system with at least seventy-five percent of its programming by microwave or other non-hardwired means, the two should be deemed to be a single system,

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[61] Time Warner Comments at 5.

[62] *Id.*

[63] *Id.*; *see also* NPCA Petition at 10-12. Time Warner opines that it makes no difference whether the SMATV system is a new construction or an acquired existing system. Time Warner Comments at 3.

[64] *See, e.g., Leacom, Inc.*, 31 R.R.2d 156 (1974); *Sanwick Cablevision, Inc.*, 48 FCC 2d 563 (1974).

[65] *Massachusetts Community Antenna Television Commission*, 64 RR 2d 173 (1987) (a system serving both single-family homes and MDUs, which was located entirely on private property and interconnected by hard wire, is a cable system under Section 602(6)(B)).

thereby subjecting the SMATV system to all of the cable system's franchise obligations.[66]

35. Multivision, on the other hand, asserts that neither stand-alone, nor integrated, SMATV systems should be subject to local cable franchise requirements[67] because SMATV facilities that serve subscribers in one or more MDUs under common ownership, control, or management and do not use public rights of way are excluded from the definition of a cable system (Section 602(7) of the Communications Act),[68] and are not subject to the franchise requirement of Section 621(b) of the Communications Act.[69] According to Multivision, because SMATV systems are not "cable systems," the Communications Act does not confer authority on the Commission or local governments to force SMATV systems owned by cable operators to comply with local franchise requirements.[70]

36. Multivision argues that there are no public policy reasons for subjecting SMATV systems to the franchise terms because: (a) local governments do not have jurisdiction since SMATV systems do not use public rights of way; (b) the entity in control of the development (i.e., the landlord, developer, condominium board or homeowner's association) does not need the protection of the local government because it has bargaining power equivalent to that of the cable operator, and it is better positioned to determine the needs of the development's multichannel video subscribers; and (c) the terms of the SMATV system's service agreement are the result of arm's length negotiations.[71] Further, Multivision adds that it is inappropriate to impose another level of regulatory requirements on SMATV service because economies of providing service to customers in MDUs are different, and franchise requirements will conflict with the terms and conditions of the private SMATV service contracts, thereby creating confusion and legal ambiguity.[72] Multivision also believes that requiring SMATV systems to be operated in accordance with franchise agreements will deny residents of buildings where SMATV service is offered of amenities and benefits they would otherwise be able to enjoy.[73]

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[66] Time Warner Petition at 4.

[67] Multivision Petition at 4.

[68] *FCC v. Beach Communications, Inc.*, ___ U.S. ___, 113 S. Ct. 2096 (1993).

[69] 47 U.S.C. § 541(b).

[70] Multivision Petition at 4-5.

[71] *Id.* at 5.

[72] *Id.* at 6.

[73] *Id.*

37. *Discussion*. As we discussed above, Time Warner is correct in its assertion that a SMATV system that is interconnected with a franchised cable system ceases to be a SMATV system, and customers that receive programming through the former SMATV facilities must be served by the cable operator in accordance with its franchise obligations.[74] By adding Section 613(a)(2) to the Communications Act, Congress has required cable operators to comply with their franchise obligations even where the facilities used would otherwise qualify for the SMATV exception to the definition of a cable system. Therefore, Time Warner and NPCA are correct in their assertions that a franchised cable operator's use of "SMATV facilities" in accordance with franchise obligations does not constitute service "separate and apart" from franchised cable service, and therefore, does not constitute a violation of the cross-ownership restriction.

38. We reject Multivision's argument that we lack authority to require franchised cable operators to operate SMATV systems under their ownership, control or management within their franchise areas in accordance with their franchise obligations. As we discussed more fully above, we conclude that Section 613(a)(2) clearly restricts cable system operators from offering SMATV service inconsistent with its franchised cable service.[75] Moreover, we believe that Section 613(a)(2) applies to all parts of the particular franchise area served by the cable system that is prohibited from offering SMATV service separate and apart from its franchised cable service. The revised rules that we adopt today are, therefore, fully consistent with Section 613(a)(2).

39. We also reject Multivision's argument that there are no public policy reasons for requiring cable operators to operate SMATV systems in accordance with their franchise obligations. Absent the requirement that cable operators who seek to offer multichannel video service within their franchise area through SMATV facilities must operate such system in accordance with their contract with that municipality and applicable laws, franchised cable operators could construct, acquire, or operate unregulated multichannel video programming distribution systems within their franchise areas, thereby avoiding the rate regulation provisions of the 1992 Cable Act, and our bulk discount regulations. We further note that the record in this proceeding does not contain evidence supporting Multivision's contentions regarding service contract negotiations or the bargaining power of the entities in control of MDUs.

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[74] *Supra* para. 12.

[75] We note that the revisions we adopt today do not alter the subsection of the rule that grandfathers inconsistent but previously authorized ownership arrangements predating enactment of Section 11 of the 1992 Cable Act. *See* Appendix B, Section 76.501(e)(1), as revised.

40. We further reject Multivision's contention that the economies of providing SMATV service in an MDU are sufficiently different from those involved in providing franchise-wide cable service that a cable operator acquiring a cable system should not be required to operate the SMATV system in accordance with its franchise agreement requirements. Multivision's argument is premised on two flawed assumptions: (a) that SMATV systems attain 100% subscriber penetration within MDUs; and (b) cable operators are unable to offer bulk rates. Multivision provides no evidence to support its suggestion that SMATV systems typically reach 100% penetration. In fact, we recently found evidence that indicates this assumption is incorrect.[76] Furthermore, we note that although Section 623(d) of the Communications Act requires a cable operator to have a uniform rate structure throughout the area served by its cable system, cable operators are permitted to offer bulk discount rates if they are made available to all similarly sized MDUs in the franchise area, and the cable operator demonstrates that it receives some economic benefit from offering the discount.[77]

C. SMATV Operators' Sales or Assignments of Access Rights to Cable Operators

41. NPCA seeks clarification of a footnote in the *First Report & Order,*[78] which provides that "where a SMATV contract has been terminated by either party, we would not prohibit a cable operator from providing cable service over preexisting facilities."[79] NPCA states that "[w]ithin the CATV and SMATV industries, this language has been interpreted as prohibiting a SMATV operator from assigning its contractual rights in favor of the local cable operator since the assignment of a contract does not cause its termination."[80] NPCA argues that SMATV operators should be subject to the same rules that apply to MMDS

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[76] *E.g., 1994 Competition Report* ¶ 93, 9 FCC Rcd at 7489. *See also Clearview Cable TV, Inc.*, DA 94-1172, ¶ 8, 9 FCC Rcd 6144, 6145 (CSB 1994) (SMATV system subscriber penetration rate of 66.9%).

[77] 47 U.S.C. § 543(d). *See also Implementation of the 1992 Cable Act: Rate Regulation & Buy-Through Prohibition, Third Order on Reconsideration*, 9 FCC Rcd 4316 (1994). In the *1993 Rate Report & Order,* the Commission observed that cable systems often offer bulk discounts to subscribers in MDUs, and expressed a desire that bulk discounts not be used as a means of displacing competition from alternative MVPDs, such as SMATV operators. *1993 Rate Report & Order* ¶ 424, 8 FCC Rcd at 5898.

[78] *First Report & Order* ¶ 124 n. 106, 8 FCC Rcd at 6846 n. 106.

[79] NPCA Petition at 15.

[80] *Id.*

operators, who can sell or assign access rights and internal wiring.[81] We conclude that our decision to permit cable operators to acquire SMATV facilities within their service areas renders moot NPCA's concerns regarding conveyances of access contracts and distribution facilities. Therefore, we do not further address those issues.[82]

D. Grandfathering

42. Section 613(a)(2)(A) of the Act provides that the Commission shall waive the ownership restrictions for all existing MMDS and SMATV services that were "owned by a cable operator on the date of enactment of this paragraph."[83] The Wireless Cable Association International, Inc. ("WCA") and Oklahoma Western Telephone Company ("Oklahoma Western"), request reconsideration or clarification of the rules adopted in the *First Report & Order* pertaining to the appropriate dates for grandfathering of permissible combinations.[84] In addition, Time Warner argues that we should permit cable operators to consummate any transactions involving the acquisition of SMATV systems within their service areas, if those acquisitions had been agreed to prior to the effective date of the 1992 Cable Act.[85]

43. *Discussion*. In two separate *Erratum* to the *First Report & Order* the Mass Media Bureau responded to WCA's and Oklahoma Western's concerns and corrected the relevant MMDS-cable and SMATV-cable cross-ownership rules to grandfather authorized combinations in existence as of October 5, 1992.[86] However, we decline to follow Time Warner's suggestion that we also grandfather arrangements between private parties that were

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[81] *Id.* at 2, 13-15.

[82] We note, however, that we may address MDU wiring concerns in connection with our resolution of the pending petitions for reconsideration of the home wiring rules. 47 C.F.R. § 76.802; *Implementation of the 1992 Cable Act (Cable Home Wiring), Report & Order,* 8 FCC Rcd 1435 (1993), *recon. pending* (MM Docket No. 92-260).

[83] 47 U.S.C. § 533(a)(2)(A).

[84] Petition for Partial Reconsideration filed by the Wireless Cable Association International, Inc. ("WCA Petition") at 4; Petition for Clarification or Reconsideration filed by Oklahoma Western Telephone Company ("Oklahoma Western Petition") at 4-5.

[85] Time Warner Petition at 6.

[86] *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal and Vertical Ownership Rules, Cross-ownership Rules and Anti-Trafficking Provisions), Erratum,* 8 FCC Rcd 6212 (MMB 1993); *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal and Vertical Ownership Rules, Cross-ownership Rules and Anti-Trafficking Provisions), Erratum*, 8 FCC Rcd 6884 (MMB 1993).

agreed to prior to December 4, 1992. First, the statutory language refers to interests "owned" on the enactment date. We believe this language restricts grandfathering to cross-ownerships actually in existence at that time, not to merely contemplated or planned arrangements. Second, Congress expressly provided for the grandfathering of MMDS and SMATV cross-ownership interests as of the enactment of Section 613. We believe that this was intentional: most other provisions of the 1992 Cable Act went into effect on its effective date -- December 4, 1992. Had Congress envisioned allowing additional cross-ownership, it would have set the effective date of the cross-ownership provision at the effective date of the 1992 Cable Act, not the enactment date, in order to allow parties negotiating transactions an opportunity to close by December 4, 1992. We believe that the fact that Congress specified the enactment date of the statute as the effective date for this provision demonstrates its intent that only cross-ownership arrangements in existence and authorized as of October 5, 1992, were to be grandfathered.

III. ANTI-TRAFFICKING

44. *Background*. Section 617 of the Communications Act establishes a three-year holding requirement for cable systems that, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a thirty-six month period following either the acquisition or initial construction of the system.[87] The statute expressly exempts from the restriction: "(1) any transfer of ownership interest in any cable system which is not subject to Federal income tax liability; (2) any sale required by operation of any law or any act of any Federal agency, any State or political subdivision thereof, or any franchising authority; and (3) any sale, assignment, or transfer, to one or more purchasers, assignees, or transferees controlled by, controlling, or under common control with, the seller, assignor, or transferor."[88] Section 617 also authorizes the Commission to grant waivers in cases of default, foreclosure or other financial distress, and on a case-by-case basis where a waiver serves the public interest; provides that certain subsequent transfers of systems are not subject to the holding requirement; and imposes a 120-day time limit on local franchise authority action on a request for approval of a transfer of a cable system held for three or more years.[89]

45. In the *First Report & Order*, we adopted rules that: (a) implement the statutory anti-trafficking provision; (b) delineate specific instances where waiver requests will be favorably reviewed; and (c) institute a blanket waiver for small systems.[90] We concluded that Congressional intent underlying the anti-trafficking provision was to restrict

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[87] Communications Act § 617, 47 U.S.C. § 537.

[88] Communications Act § 617(c), 47 U.S.C. § 537(c).

[89] Communications Act § 617(b), (d)-(e); 47 U.S.C. § 537(b), (d)-(e).

[90] *First Report & Order* ¶¶ 9-91, 8 FCC Rcd at 6830-41; *see* 47 C.F.R. § 76.502.

profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, but not to inhibit investment in the cable industry or delay or disrupt legitimate cable transactions.[91]

46. Specifically, we determined that the three-year holding requirement applies to transactions involving changes in ownership that constitute a transfer of control.[92] We interpreted the exemptions as applying to changes of control that are the result of tax exempt transactions, involuntary transfers and transfers involving municipally-owned cable systems, and *pro forma* transfers or assignments.[93] We determined that the statutory 120-day time period for local franchise authority review of a request for approval of the transfer of a cable system owned for three or more years commences when the cable operator submits a transfer request to the local franchise authority that contains all the information required by Commission regulations and by the terms of the franchise agreement or applicable state or local law.[94] We adopted a blanket waiver of the Commission's anti-trafficking rules for transfers of cable systems serving 1,000 or fewer subscribers.[95] We also adopted a rule providing for favorable consideration of requests by multiple system operators ("MSOs") for waivers of the anti-trafficking rules for the purpose of facilitating the transfer or sale of multiple systems if two-thirds of the subscribers of the systems being sold or transferred are

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[91] *First Report & Order* ¶¶ 11, 21, 36, 8 FCC Rcd at 6830, 6831, 6833. Both the legislative history and the *First Report & Order* contain references to "profiteering" as behavior that the anti-trafficking statutory provision and rules are designed to prevent. S. Rep. No. 92, *supra*, at 120; *First Report & Order* ¶¶ 11, 21, 8 FCC Rcd at 6830-31. "Profiteering" is defined, however, as "[t]aking advantage of unusual or exceptional circumstances to make excessive profits; *e.g.* selling of scarce or essential goods at inflated prices during time of emergency or war." *Black's Law Dictionary* 1090 (5th ed. 1979). Therefore, on reconsideration we recognize that the term "profiteering" is a misnomer as it has been used with respect to the anti-trafficking rules. We believe Congress passed the anti-trafficking provision of the 1992 Cable Act, not because of a concern about "profiteering," but rather because of a concern over speculative purchases and sales of cable systems made for the purpose of realizing quick profits from increases in values, which could overburden systems with debt and thereby lead to higher rates and reduced services for subscribers.

[92] *First Report & Order* ¶ 23, 8 FCC Rcd at 6832.

[93] *Id.* ¶¶ 57-73, 8 FCC Rcd at 6837-39.

[94] *Id.* ¶ 84-86, 8 FCC Rcd at 6840; 47 C.F.R. § 76.502(i)(1).

[95] *First Report & Order* ¶ 91, 8 FCC Rcd at 6841. As with any anti-trafficking waiver granted by the Commission, whether a small system blanket waiver or an individual waiver, the underlying transfer remains subject to receipt of local franchise authority transfer approval where such approval is required by the terms of the franchise agreement or applicable state or local law.

served by systems owned for three or more years.[96]

A. Local Franchise Authority Consideration of Transfer Requests

1. The 120-Day Period for Review of Transfer Requests for Cable Systems Held for Three Years

47. *Pleadings*. The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors and the National Association of Counties (collectively, "NATOA") believe that although the anti-trafficking rules are based on a recognition of the role local franchising authorities have with respect to approving transfer requests, certain of the rules may encroach upon the traditional right of franchising authorities to review transfer requests, in contravention of the plain language and intent of Section 617.[97] NATOA argues that Section 617 of the Communications Act contains no limit on the information a franchising authority may require a cable operator to submit in connection with a request for approval of a sale or transfer, and challenges the propriety of the Commission's implementation of rules that limit the amount and type of information the local franchise authority may obtain from the cable operator to information specifically required by FCC Form 394, the terms of the franchise agreement or applicable state or local law.[98]

48. NATOA also argues that the 120-day period should not begin to run until all information requested by the local franchise authority has been submitted and the local franchise authority so notifies the cable operator. The current rule, according to NATOA, inappropriately limits the duration of local franchising authorities' power to disapprove cable system transfers.[99]

49. Time Warner and NCTA oppose NATOA's petition, asserting that extending the 120-day period for franchise authority approval of transfers of control would provide local franchising authorities with extraordinary authority to require virtually any type of information from cable operators, thereby effectively eviscerating the statutory time limit.[100] NCTA contends that the time limitation ensures that transfers of cable properties are not

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[96] *Id.* ¶ 52, 8 FCC Rcd at 6836; 47 C.F.R. § 76.502(g)(1).

[97] Petition for Reconsideration and Clarification filed by NATOA ("NATOA Petition") at 2.

[98] *Id.* at 3.

[99] *Id.* at 3-4.

[100] NCTA Comments at 2; Time Warner Comments at 6.

subjected to protracted approval processes, and that a definitive starting point for the 120-day statutory period is necessary to prevent unwarranted and abusive delays.[101] Time Warner also contends that a time limitation is necessary to help ensure that local franchise authorities do not use the transfer approval process to extract concessions or effect inappropriate policy objectives.[102] Time Warner further contends that the Commission's current rule is consistent with Congressional intent.[103]

50. *Discussion*. Section 617(e) of the Communications Act sets a 120-day time frame for local franchise authority action on requests for approval of transfers or assignments of control over cable systems held for more than three years, provided the local franchise agreement requires local franchise authority approval of a sale or transfer.[104] Our implementing rules provide for commencement of the 120-day period when the cable operator has submitted a completed FCC Form 394 and any additional information required by the terms of the franchise agreement or applicable state or local law.[105] We concluded in the *First Report & Order* that local franchise authorities are permitted to request additional information they deem reasonably necessary to determine the qualifications of the proposed assignee or transferee, but that requests for information not explicitly required by the franchise agreement or local law will not toll the statutory 120-day limitation unless the franchise authority and the cable operator agree to an extension of time.[106] The rationale underlying this rule is to provide cable operators some degree of assurance and certainty that local franchise authorities will act promptly and not unduly delay consummation of proposed transactions. We affirm the rule we adopted in the *First Report & Order* and, accordingly, deny NATOA's request that the 120-day period not commence until the cable operator is affirmatively advised that the franchise authority has received all information it seeks.

51. Section 617(e) provides that when a local franchise agreement grants the local franchise authority the right to review sales or transfers of cable systems held for three or more years, the franchise authority shall have 120 days to act upon any such request that contains the information required by Commission regulation or by the franchise authority.[107]

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[101] NCTA Comments at 3.

[102] Time Warner Comments at 7.

[103] *Id.*

[104] 47 U.S.C. § 537(e).

[105] 47 C.F.R. § 76.502(i)(1)

[106] *First Report & Order* ¶¶ 4, 85-86, 8 FCC Rcd at 6829, 6840.

[107] Specifically, Section 617(e) provides in relevant part that in the case of a cable system (continued...)

We have interpreted this language as a limitation on the information a cable operator must provide to trigger the 120-day time period. While this language arguably could be interpreted to allow unlimited requests for information by the franchise authority, we do not believe that such an interpretation comports with the intent of Congress.

52. In enacting Section 617(e), Congress imposed a 120-day approval period on the sale or transfer of cable systems held for three or more years because Congress wanted to ensure that the local franchise approval process not unduly delay the consummation of transactions that do not implicate the concerns underlying the anti-trafficking provision. The language of the statute and the legislative history reflect Congress' expectation that the Commission establish regulations designed to ensure that franchising authorities that possess the right to review transfer requests receive the information required to begin an evaluation of a request for approval of a sale or transfer of such a cable system.[108] Accordingly, we created FCC Form 394 with the expectation that the information required by the form would establish the legal, technical, and financial qualifications of the proposed transferee or assignee. The legislative history also clearly establishes that Congress intended to allow local franchise authorities to request information that is required by the franchise agreement, in addition to that required by Commission regulation.[109] Consequently, we adopted rules requiring a cable operator seeking local franchise authority approval of a proposed transfer to submit any additional information provided by the terms of the franchise agreement. The

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[107](...continued)
owned for three or more years, "a franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." 47 U.S.C. § 537(e).

[108] H.R. Rep. No. 628, 102d Cong., 1st Sess. 120 (1992) (the "House Report"). We noted in the Notice of Proposed Rule Making in this proceeding that the language of the 1992 Cable Act implies that the 120-day approval period will not commence unless a transfer request is accompanied by all information the Commission requires in connection with such transfer requests. *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), Notice of Proposed Rule Making and Notice of Inquiry* ¶ 22, 8 FCC Rcd at 214.

[109] H.R. Rep. No. 628, *supra*, at 120. In the discussion of Section 617(e) the House Report contains the statement that "[t]he amendment is not intended to limit, or to give the FCC authority to limit, local authority to require in franchises that cable operators provide additional information or guarantees with respect to a cable sale or transfer." *Id.* Further, the House Report also states, in reference to the grant of waiver authority to the Commission that the "Committee does not intend that the 3-year holding period requirement expand or restrict the current rights that any franchise authority may have concerning approval of transfers or sales." *Id.*

rules we adopted provide that the franchise authority shall have 120 days from the submission of a completed FCC Form 394 and any additional information required by the terms of the franchise agreement or applicable state or local law, to act upon the waiver request.[110] Thus, the cable operator is on notice that information requirements may exist in three locations and that the submission of all such information is necessary for the franchise authority to be bound by the 120-day time period. To the extent the local franchise authority seeks additional information, as we stated in the *First Report & Order*, cable operators are required to respond promptly by completely and accurately submitting all information reasonably requested by the franchise authority.[111]

53. We believe Congress sought to provide a degree of regulatory certainty to cable operators when it established the 120-day time period for franchise authority action on transfer requests pertaining to cable systems held for three or more years. We also believe that submission of the information required by FCC Form 394, the franchise agreement and state or local law, is sufficient to commence the 120-day time period for local franchise authority action on the request. This conclusion provides a degree of certainty to the parties, comports with the legislative history and is consistent with our rulings with respect to franchise authority action on rate regulation matters.[112]

2. FCC Form 394

54. *Pleadings*. Multivision requests that the Commission delete from FCC Form 394 the question that asks the transferee/assignee about "any plans to change current terms and conditions of service and operations of the system as a consequence of the transaction for which approval is sought."[113] Multivision asserts that the inquiry is difficult to answer; subjects the transferee to penalties under Section 1001 of Title 18 of the United States Code, and allegations of violating the transfer consent if plans do change; provides the local franchise authority an opportunity to weigh in on the transferee's plans; and does not focus

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[110] 47 C.F.R. § 76.502(i)(1).

[111] *First Report & Order* ¶ 86, 8 FCC Rcd at 6840. As we further stated in the *First Report & Order*, while franchise authorities are permitted to request additional information, "such requests for additional information, beyond the requirements of the franchise agreement or local law, will not toll or extend the 120-day period unless the cable operator and franchise authority otherwise agree to an extension of time as provided by the statute." *Id.*

[112] *See, e.g., Implementation of 1992 Cable Act (Rate Regulation), Second Order on Reconsideration, Fourth Report & Order & Fifth Notice of Proposed Rulemaking* ("*Second Rate Recon.*") ¶ 147, 9 FCC Rcd 4119, 4188 (1994) (MM Docket 92-266).

[113] Multivision Petition at 9.

on the transferee's qualifications.[114]

55. *Discussion*. Form 394 specifies the information requirements we deemed sufficient to establish the legal, technical and financial qualifications of the proposed transferee of a cable system held for three years. In developing the information requirements contained in Form 394, we looked to the information required by the Commission in connection with transfer requests for broadcast licenses and CARS (microwave cable antenna relay service) authorizations.[115] We also looked at the legislative history of Section 617 in developing the information requirements. We note that the House Report stated that such information may include "information concerning the transferee's plans for expanding (or eliminating) services to subscribers" and "detailed financial information showing the effect of the transfer or sale on rates and services."[116] We believe that the information sought in Form 394 regarding plans to change the terms and conditions of service and operation of the system is appropriate. The question is directed at the transferee's current plans. We do not expect cable operators to be prescient, nor is the question intended to elicit uncertain future possibilities. We do not foresee cable operators being held to unreasonable or unrealistic expectations to foretell future events, or being held accountable for failing to predict the future course of events, as Multivision suggests. Moreover, truthful answers are not subject to the penalties of 18 U.S.C. § 1001.

56. We note as a matter of clarification that transferees and assignees responding to the inquiry in Form 394 regarding their legal qualifications, in particular Question 5 of Section II pertaining to adverse findings or actions by courts and administrative bodies, should be guided by the character qualification policy statements adopted by the Commission in 1986 and 1990.[117]

57. We also take this opportunity to clarify that Form 394 is to be used to apply for franchise authority approval to assign or transfer control of a cable system owned for three or more years. Form 394 is not intended for use by a cable operator seeking local franchise authority approval of an assignment or transfer of a cable system held for less than three years.

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[114] *Id.* at 9-10.

[115] *First Report & Order* ¶ 85, 8 FCC Rcd at 6840.

[116] H.R. Rep No. 628, *supra*, at 120.

[117] *In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing, Report, Order and Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421, *appeal dismissed sub nom.*, NABB v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987); *Policy Regarding Character Qualifications in Broadcast Licensing, Policy Statement and Order*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991).

3. *Review Premised Upon State or Local Law*

58. *Pleadings*. NATOA asserts that franchise authorities' right to review transfer requests may arise from state or local law or ordinance and that the Commission's rules should be clarified to expressly state that a local franchise authority has the right to review a transfer request if permitted under applicable state or local law.[118] In support of its argument, NATOA asserts that the Commission recognizes the rights conferred by state or local law in other aspects of its rules, for example, by providing that a small system waiver of the three-year holding period does not become effective until the transfer is approved by the local franchise authority where such approval is required by the terms of the franchise agreement or applicable state or local law.

59. *Discussion*. We agree with NATOA that where local or state law requires franchise authority approval of cable system transfers or assignments, local franchise authorities may require cable operators to obtain their approval, regardless of whether the franchise agreement so requires. We recognize in other aspects of the anti-trafficking rules that local or state law may impose obligations upon the franchise authority, and extending express recognition to basic transfer decisions merely clarifies this matter. We are revising our rules accordingly.

4. *Certifications of Compliance with the Anti-Trafficking Provision*

60. *Pleadings*. Multivision requests clarification as to whether cable operators must file certifications of compliance with the anti-trafficking provision in connection with transactions that are exempt from the three-year holding period.[119] It further requests that cable operators be authorized to submit certifications of compliance to the Commission rather than to local franchise authorities.[120] Multivision asserts that cable operators should be permitted to submit anti-trafficking certifications to the Commission in every instance, but that, at a minimum, submission of the certification to the Commission should be permitted when the local franchise agreement does not require local consent to the transfer of the cable system.[121] Multivision argues that providing the certification to the local franchise authority serves no useful public policy purpose, interjects a federal issue into local processes, and invites delays because it offers local franchise authorities an opportunity to scrutinize and delay transactions outside the scope of local jurisdiction, and to interject their own inconsistent rulings which will adversely impact buyers, sellers, investor and lenders who

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[118] NATOA Petition at 6.

[119] Multivision Petition at 8-9.

[120] *Id.* at 7.

[121] *Id.*

need predictability and certainty.[122]

61. *Discussion*. We stated in the *First Report & Order* that every assignment or transfer of a cable system requires a certification of compliance with the anti-trafficking statutory provision. In particular, we required that a cable operator seeking to sell or transfer a cable system certify to the local franchise authority that: (a) the transfer complies with the anti-trafficking rule; (b) the transferror is seeking or has obtained a waiver of the anti-trafficking rule from the Commission; or (c) the transfer is otherwise exempt from the anti-trafficking rule.[123] We also stated that, in the case of transactions that are exempt from the holding period, the certification submitted to the local franchise authority should "describe the nature of the transaction and identify the applicable exemption accompanied by a statement of the facts giving rise to the claimed exemption."[124] We further provided that "[l]ocal decisions regarding . . . eligibility for one of the exemptions . . . are reviewable by the FCC . . . ."[125]

62. We reject Multivision's suggestion that certifications of compliance should be filed with the Commission rather than the local franchise authority. We determined in the *First Report & Order*, consistent with the dual regulatory framework adopted in the 1992 Cable Act, to vest primary responsibility for enforcement of the statutory anti-trafficking provision with local authorities.[126] We affirm that conclusion. Most cable systems must be authorized by local authorities in order to provide service.[127] Thus, nearly every cable system is subject to local jurisdiction. The fact that a local franchise agreement may not expressly provide for local franchise authority approval of a proposed sale or transfer of a cable system does not diminish the fact that local jurisdiction exists, or as noted in the *First Report & Order*, that local authorities are best positioned to monitor compliance with the holding period in the first instance.[128] Moreover, as noted in the *First Report & Order*, we believe this procedure simplifies enforcement and minimizes administrative burdens on both cable operators and the Commission.[129] Multivision offers no new reasons for reversing our

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[122] *Id.* at 7-8.

[123] *First Report & Order* ¶ 37, 8 FCC Rcd at 6833.

[124] *Id.* ¶ 37, 8 FCC Rcd at 6834.

[125] *Id.* ¶ 39, 8 FCC Rcd at 6839.

[126] *Id.* ¶ 36, 8 FCC Rcd at 6833.

[127] *See, e.g.*, Communications Act § 621, 623, 47 U.S.C. § 541, 543.

[128] *First Report & Order* ¶ 36, 8 FCC Rcd at 6833.

[129] *Id.* ¶ 41, 8 FCC Rcd at 6834.

conclusion, and we reject the unsupported notion that local franchise authorities will interject uncertainty into the process. We thus reiterate that cable operators are obligated to submit anti-trafficking certifications to the local franchise authorities for all proposed transfers, assignments or sales of cable systems.

63. We also take this opportunity to clarify that if local franchise authority approval of an assignment or transfer of a cable system is not required and the system has been held for three or more years, the cable operator is not required to use FCC Form 394 solely for purposes of submission of the anti-trafficking certification. Rather, in that circumstance, the cable operator may submit its certification of compliance with the anti-trafficking provision as a separate document.

B. The Three Year Holding Period

1. Calculation of the Holding Period for Exempt Transactions

64. *Pleadings*. No party seeking reconsideration raised an issue regarding the timing of the commencement of the holding period. However, we have received a number of informal questions regarding this matter.[130] Therefore, we take this opportunity to clarify the application of the rules in this area. The issue is whether the three-year holding period commences anew when the transaction involves the transfer of a cable system that qualifies for one of the three exemptions. It has been informally suggested that such transactions do not invoke any of the concerns underlying Congress' adoption of the anti-trafficking provision, and that imposing a new three-year holding period on every exempt transaction would impede necessary and desirable transactions, frustrate Congress' purpose in granting the exemptions, and limit cable operators' "exit" strategies.

65. *Discussion*. As noted above, we concluded in the *First Report & Order* that the statutory exemptions from the three-year holding period apply to *pro forma*, tax exempt, and involuntary transfers, and to transfers involving municipally-owned cable systems. However, we did not address the calculation of the holding period for transactions that utilize one of the three statutory exemptions. In the *NPRM*, we alluded to the fact that a *pro forma* transfer would not cause a new three-year holding period to commence, but were silent as to tax exempt and involuntary transactions.[131] For the reasons set forth below, and consistent with the public interest and our broad waiver authority under Section 617(d), we clarify that consummation of an exempt transaction does not restart the calculation of a new three-year

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[130] For example, the law firm of Cole Raywid & Braverman ("CRB") informally sought clarification in a letter dated May 5, 1994, that has been placed in the record of this proceeding.

[131] *NPRM* ¶ 17, 8 FCC Rcd at 213.

holding period.

66. First, we believe that no sound basis exists to require a new three-year holding period to begin after every *pro forma* transfer. A *pro forma* transfer is, by its terms, not a substantial change of control. Such transactions do not raise the specter of speculation or exploitation of short-term ownership that concerned Congress when it adopted the anti-trafficking provision. Moreover, imposing a new holding period every time *pro forma* restructuring occurs would impose unnecessary burdens on the cable industry without providing any commensurate benefits.

67. Second, we note that Congress exempted involuntary transfers of control from the minimum holding requirement in part because it did not want to tie the hands of the courts or local franchise authorities, or unnecessarily create a defense against foreclosure. We concluded in the *First Report & Order* that involuntary transfers are generally necessitated by changed or unforeseen circumstances.[132] Indeed, we noted that such transfers would likely include involuntary transfers to effect bankruptcy, divorce or probate proceedings.[133] We believe that we would be imposing unnecessarily costly and burdensome obligations on those persons who acquire cable systems through involuntary transfer procedures if we were to require them to hold those systems for three years, or to obtain waivers of the statutory three-year holding period in order to sell those systems. Consequently, we conclude that the holding period should not recommence upon the consummation of an involuntary transfer.

68. Third, Congress provided an exemption for tax exempt transactions because it concluded that such transactions do not implicate the concerns underlying the three-year holding requirement. We believe applying the exemption to systems acquired pursuant to a tax exempt transaction is consistent with Congress' intent regarding treatment of such transactions. Moreover, we have seen no evidence to suggest that transactions that do not incur income tax liability will adversely affect cable subscriber rates and services. Consequently, we see no compelling basis to insist that such transactions be treated differently than *pro forma* and involuntary transfer transactions.[134]

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[132] *First Report & Order* ¶ 67, 9 FCC Rcd at 6838.

[133] *Id.*

[134] We note that this determination does not affect any holding requirement that may exist pursuant to other Commission policies, and in particular does not affect any holding period required for a minority tax certificate issued by the Commission pursuant to Section 1071 of the Internal Revenue Code.

2. *Multiple System Transfers*

69. *Pleadings*. In a footnote, NATOA suggests that we should reconsider our decision to provide favorable treatment to MSO waiver requests, arguing that permitting the transfer of one-third of an MSO's systems that have not been held by the MSO for three or more years will have a greater impact on subscribers than even the small system blanket waiver simply because of the number of subscribers served by MSO's.[135]

70. *Discussion*. We concluded in the *First Report & Order* that application of a separate three-year holding period to each system owned by a particular MSO may be inappropriate in some circumstances because common ownership may create economies of scale that benefit subscribers and common ownership of nearby cable systems may create operating efficiencies and allow expansion of service to previously unserved areas.[136] We therefore determined that we would look favorably upon waiver applications if two-thirds or more of the MSO's subscribers are served by systems owned for three or more years, and if an MSO transfers several systems in a single transaction and two-thirds of the subscribers of the systems being transferred are served by systems the MSO owned for three years or more.[137] NATOA does not offer any evidence that our MSO rules have had any adverse impact on subscribers nor does NATOA assert we erred in the rationale underlying the rules. Other than asserting that a large number of subscribers are served by MSOs, NATOA proffers no basis for reconsideration of our MSO transfer rules and we see no reason to revise these rules.

71. We take this opportunity, however, to clarify two aspects of our MSO transfer rules. First, Section 617(b) of the Communications Act provides that in the case of MSO transfers, "if the terms of the sale require the buyer to subsequently transfer ownership of one or more such systems to one or more third parties, such transfers shall be considered a

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[135] NATOA Petition at 8 n. 6.

[136] *First Report & Order* ¶ 51, 8 FCC Rcd at 6836. In the *First Report & Order* we concluded that: (a) for initially constructed cable systems, the three-year holding period is measured from the date on which service is activated to the system's first subscriber; and (b) for acquired systems, the holding period commences on the effective date of the closing of the transaction in which the system was acquired. *First Report & Order* ¶¶ 46-47, 8 FCC Rcd at 6835. We also concluded that, rather than establish separate procedures for MSO transfers or impose uniform application of a separate holding requirement to each system owned by a particular MSO, we would treat waiver requests involving MSO transfers favorably. *Id.* ¶¶ 51-52, 8 FCC Rcd at 6836. We noted that the anti-trafficking provision is not intended to thwart the development of systems or unnecessarily deter MSO transfers and that applying a separate holding requirement on each individual system could sacrifice some of the benefits afforded by multiple system ownership. *Id.*

[137] *Id.* ¶ 52, 8 FCC Rcd at 6836.

part of the initial transaction."[138] In the *First Report & Order*, we determined that subsequent transfers must be completed within a reasonable amount of time following completion of the original transaction in order to qualify for the treatment provided by the statutory provision.[139] Our rules specify that in order to qualify as part of the initial transaction, a request for approval of the subsequent transfer must be filed with the local franchise authority within ninety days of the closing date of the original transfer and the closing date of the subsequent transfer must be no later than ninety days following the grant of the transfer approval by the local franchise authority.[140] If local franchise approval is not required, our rules specify that the subsequent transfer must be completed within 180 days of the date of the closing of the original transaction in order to qualify as part of the original transaction.[141]

72. Our rules do not address the situation where the subsequent transfer involves multiple systems with differing franchise approval requirements. For example, if franchise authority approval is required for some but not all of the transfers, our rules could require the subsequent transfer of the system not requiring franchise authority approval to close within 180 days, while the subsequent transfer to the same party of the system requiring franchise authority approval could conceivably consume 300 or more days (90 days to file the request, 120 days or more for franchise approval and 90 days to close). Although we recognize that the parties could hold separate closings, or could complete the entire transaction within 180 days,[142] we are concerned that such a requirement would be inconsistent with our determination that the anti-trafficking provisions are not intended to impede MSO transactions. While we continue to believe that subsequent transfers should occur within a reasonable amount of time, we conclude that where a subsequent transfer involves both systems that require franchise approval and systems that do not, the original transferee must complete the subsequent transfers of all affected systems within 90 days of the date the last system involved receives franchise authority approval of the transfer.

73. Second, notwithstanding our determination to treat MSO transfers in a favorable fashion, some clarification is warranted regarding the basis for calculating subscribers served by systems held for three years. Generally, the commencement of the holding period is relatively straightforward, i.e., calculation of the holding period relates

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[138] 47 U.S.C. § 537(b).

[139] *First Report & Order* ¶ 56, 8 FCC Rcd at 6836.

[140] *Id.*; 47 C.F.R. § 76.502(e)(1993).

[141] *First Report & Order* ¶ 56, 8 FCC Rcd at 6836.

[142] The transaction could be completed in 180 days if the approval request is filed within 30 days, the franchise authority acts within 120 days (assuming the original operator owned the system for three years) and closing occurs 30 days thereafter.

back to the date of activation of the system's first subscriber or the effective date of the closing of the transaction in which the system was acquired.[143] The three-year holding period does not begin anew when the system extends lines into existing or new communities, or when the system integrates previously separate communities through line extension. In other words, a large system that interconnects multiple communities via wire from a single headend calculates its holding period from either the date of activation of the system's first subscriber or the effective date of the closing of the transaction in which the system was acquired. However, a large system with multiple headends calculates the holding period for each system served by each headend. Our rule providing for favorable treatment of MSO transfers can be invoked in the event a multiple-headend MSO system is sold.

74. If a cable operator acquires an adjoining system served by a separate headend, the holding period for the adjoining system commences upon the date of the closing of the acquisition. The holding period attendant to the original system does not extend to the newly acquired system; rather, the newly acquired system maintains a separate three-year holding period. If, however, the purchaser removes the headend serving the acquired system and interconnects the acquired system with the original system through line extension, the holding period for that particular system becomes the same as the holding period for the system into which it was integrated. In other words, when systems are interconnected and served from a single headend, they maintain a uniform holding period.

75. We believe this clarification renders our rules neutral as to system upgrades, and permits expansion and deployment of new technologies without potentially adverse regulatory consequences. We further note that calculation of the holding period is for the purpose of determining whether it is necessary to seek a waiver from the Commission. The ultimate decision to approve a proposed transfer rests with the local franchise authority, if such authority is provided in the local franchise agreement or by state or local law.

C. Waivers

76. *Pleadings*. NATOA contends that the Commission's blanket waiver of the three-year holding requirement for small systems circumvents the "public interest" intent

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[143] We note that a "cable system" is defined, in relevant part, in Section 602(7) of the Communications Act and Section 76.5 of our rules as a facility "consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7); 47 C.F.R. § 76.5. In terms of practical application of this definition, the parameters of a system are typically the area and subscribers served from a particular headend or connected set of headends. *See, e.g., Second Rate Recon.* ¶¶ 201, 226-27, 9 FCC Rcd at 4218, 4231-32.

behind the statutory waiver provision and should be eliminated.[144] NATOA argues that by focusing on the "financial and administrative burdens" the holding period places upon small system operators as justification for the blanket waiver, the Commission ignored that the holding requirement is intended to protect subscribers from transactions that will likely have an adverse impact on cable rates or service.[145] NATOA asserts that the impact is significant: more than half of all cable systems serve less than 1,000 subscribers; small systems serve approximately 1.9 million subscribers nationwide; and the value of such systems is conservatively placed at $3.8 billion.[146] Time Warner contends that the Commission properly weighed numerous public interest considerations before adopting the blanket small system waiver and notes that the waiver is anticipated to cover only 3.6% of all cable subscribers nationally.[147]

77. *Discussion*. In assessing the impact of the anti-trafficking provision upon small business, pursuant to our obligations under the Communications Act,[148] we determined in the *First Report & Order* that: (a) cable systems serving rural areas with low population density are unlikely to be the subject of transactions that implicate the anti-trafficking concerns; (b) the anti-trafficking rules would create significant costs and impose administrative burdens on small systems, and may deter expansion of cable service to rural areas; (c) the expense and delay attendant to individual waiver requests may be prohibitive to small systems; and (d) a blanket waiver would reduce the burden on the Commission and affect only a small number of cable subscribers.[149] Consequently, we adopted a blanket anti-trafficking waiver for small systems. We continue to believe that this weighing and assessing of costs and benefits was precisely the type of consideration of the public interest required under our waiver authority under the Communications Act, and consequently we affirm our small system blanket waiver. We reiterate, however, that the small system blanket waiver does not affect the rights of local franchise authorities to approve transfers or sales of small systems, to the extent such approval is provided for in local franchise agreements or by local or state law. Thus, while the blanket waiver provision exempts small systems from obtaining anti-trafficking waivers from the Commission, the ultimate decision to approve or deny a transfer and assignment rests, in most cases, with the local franchise authority.

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[144] NATOA Petition at 6-7, 9.

[145] *Id.* at 7.

[146] *Id.* at 8.

[147] Time Warner Comments at 10-11.

[148] Communications Act § 623(i), 47 U.S.C. § 543(i); *see also*, Regulatory Flexibility Act of 1980, 5 U.S.C. § 603.

[149] *First Report & Order* ¶ 90, 8 FCC Rcd at 6841.

78. Small systems are defined as systems that serve 1,000 or fewer subscribers from a single headend.[150] This definition currently applies throughout Part 76 of our rules. However, we note that we are in the process of reviewing this definition.[151] To the extent any definitional changes are adopted, we will also consider appropriate changes to the small system waiver rule unless such changes would alter the fundamental basis of our analysis. In that event, we will address the continuing viability of the blanket anti-trafficking waiver in light of those changes.

79. Finally, we take this opportunity to note that our experience to date with requests for waiver of the anti-trafficking rule has demonstrated that systems owned less than three years are not being transferred or assigned purely for purposes of quick economic gain.[152] Rather, those waiver requests have been premised upon proposed transfers involving bankruptcy, systems barely over the subscriber limit established for the small system blanket waiver, a system with no change in *de facto* control and systems qualifying for treatment under our MSO transfer rules. We believe that it is appropriate, after one year of strictly scrutinizing waiver requests, to revise our approach to waiver requests. In the future, we generally will look favorably on waiver requests unless the transaction raises serious concerns on its face or any objections we receive to grant of the waiver provide other public interest bases for concern.

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[150] *First Report & Order* ¶ 91, 8 FCC Rcd at 6841. *See also Second Rate Recon.* ¶¶ 201, 226-27, 9 FCC Rcd at 4218, 4231-32.

[151] *Implementation of 1992 Cable Act (Rate Regulation), Fifth Order on Reconsideration & Further Notice of Proposed Rulemaking*, 9 FCC Rcd 5327 (1994) (MM Docket No. 93-215).

[152] *See e.g., King Kable, Inc.*, 8 FCC Rcd 1515 (MMB 1993) (no anti-trafficking concern where seller was in bankruptcy); *D.D. Cable Partners, L.P.*, 9 FCC Rcd 590 (MMB 1994) (no anti-trafficking concerns where systems barely exceeded small system blanket waiver limit and transaction resulted in consolidation of systems with adjacent systems); *People's Cable, Inc.*, 9 FCC Rcd 6101 (CSB & MMB Oct. 21, 1994) (no anti-trafficking concern where waiver necessitated by transfer of negative control within past three years); *D.D. Cable Partners, L.P.*, 9 FCC Rcd 6109 (CSB, Oct. 24, 1994) (no anti-trafficking concerns where systems barely exceeded small system blanket waiver limit and franchise authority approval acquired); *HC Crown Corp.*, 9 FCC Rcd ___ (CSB, December 23, 1994) (transaction involving large MSO did not raise anti-trafficking concerns were MSO had held systems serving two-thirds of the subscribers involved in the transaction for more than three years).

IV. REGULATORY FLEXIBILITY ANALYSIS

80. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-602, the Commission's final analysis is as follows:

81. Need and purpose of this action: This action is taken to address petitions for reconsideration of the anti-trafficking and cross-ownership rules adopted by the Commissions to implement Sections 11 and 13 of the 1992 Cable Act.

82. Summary of the issues raised by the pubic comments in response to the Initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

83. Significant alternatives considered: We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the ownership and anti-trafficking provisions of the 1992 Cable Act. The Commission modifies its restriction on cable operators' acquisitions of SMATV systems within the portion of the franchised service area served by the cable operator. We affirm the limitation on the tolling of the statutory time frame for local franchise authorities' action on requests to approve the transfer of cable systems held for three or more years. These actions are aimed at reducing unnecessary regulatory restrictions and promoting competition within the multichannel video distribution marketplace.

84. Federal rules that overlap, duplicate or conflict with these rules: None.

V. EFFECTIVE DATE

85. Effective Date: The changes to the rules adopted in this *Memorandum Opinion and Order on Reconsideration of the First Report and Order* will become effective thirty (30) days from the date of publication in the Federal Register.

VI. ORDERING CLAUSES

86. Accordingly, IT IS ORDERED, that pursuant to the authority contained in Sections 2(a), 4(i), 4(j) and 303 of the Communications Act of 1934, as amended, and in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, the rules contained in Part 76 of the Commissions Rules, 47 C.F.R. Part 76, ARE AMENDED as set forth in Appendix B below, and will become effective 30 days after publication in the Federal Register.

87. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 2, 4, 303, 405 and 601 of the Communications Act of 1934, as amended, the *Memorandum Opinion and Order on Reconsideration of the First Report and Order*,

affirming in part and modifying in part, the *First Report & Order* in this proceeding, IS ADOPTED, as provided herein.

88. IT IS FURTHER ORDERED THAT the petitions for reconsideration or clarification, set forth in Appendix A, are granted and denied to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

MM Docket No. 92-264

Parties Requesting Reconsideration or Clarification
Wireless Cable Association International, Inc. ("WCA")
Multivision Cable TV Corp. and Providence Journal Company ("Multivision")
Time Warner Entertainment Company, L.P. ("Time Warner")
National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively referred to as "NATOA")
Oklahoma Western Telephone Company ("Oklahoma Western")
National Private Cable Association, MSE Cable Systems, Cable Plus and Metropolitan Satellite (collectively referred to as "NPCA")

Parties Filing Oppositions
National Cable Television Association ("NCTA")
Time Warner

Parties Filing Replies
NATOA
Cablevision Systems Corporation ("Cablevision")
NCTA

Ex Parte Contacts

Cole Raywid & Braverman
Gardner, Carton & Douglas
Wiley, Rein & Fielding

APPENDIX B

Part 76 of Title 47 of the United States Code of Federal Regulations is amended to read as follows:

1. The authority for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. § § 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552, 554.

2. Section 76.501 is amended by revising subsections (d) and (e), redesignating subsection (e)(2)(i)-(ii) as Note 5 and subsection (e)(2)(iii) as subsection (f), and moving the Notes to the end of the rule, as follows:

* * * * *

(d) No cable operator shall offer satellite master antenna television service ("SMATV"), as that service is defined in Section 76.5(a)(2), separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system, either directly or indirectly through an affiliate owned, operated, controlled, or under common control with the cable operator.

(e) (1) A cable operator may directly or indirectly, through an affiliate owned, operated, controlled by, or under common control with the cable operator, offer SMATV service within its franchise area if the cable operator's SMATV system was owned, operated, controlled by or under common control with the cable operator as of October 5, 1992.

(2) A cable operator may directly or indirectly, through an affiliate owned, operated, controlled by, or under common control with the cable operator, offer service within its franchise area through SMATV facilities, provided such service is offered in accordance with the terms and conditions of a cable franchise agreement.

(f) The Commission will entertain requests to waive the restrictions in paragraphs (d) and (e) of this section when necessary to ensure that all significant portions of the franchise area are able to obtain multichannel video service. Such waiver requests should filed in accordance with the special relief procedures set forth in Section 76.7.

Note 1:

* * * * *

Note 5: In applying the provisions of paragraphs (d) and (e), control and an attributable ownership interest shall be defined by reference to the definitions contained in Notes 1 - 4, provided however, that:

(a) The single majority shareholder provisions of Note 2(b) and the limited partner insulation provisions of Note 2(g) shall not apply; and

(b) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

3. Section 76.502 is amended by deleting section (b), renumbering the remaining sections accordingly, adding sections (d)(3) and (f), revising section (g), and making grammatical language clarifications in sections (c), (c)(2), (h) and (i), as follows:

Sec. 76.502 Three-year holding requirement. **[Revised]**

(a) Except as otherwise provided in this section, no cable operator may sell, assign, or otherwise transfer controlling ownership of a cable system within a three-year period following either the acquisition or initial construction of such cable system by such cable operator.

(b) For initially constructed cable systems, the three-year holding period shall be measured from the date on which service is activated to the system's first subscriber through the proposed effective date of the closing of the transaction assigning or transferring control of the cable system. The holding period for acquired systems shall be measured from the effective date of the closing of the transaction in which control of the cable system was acquired through the proposed effective date of the closing of the transaction assigning or transferring control of such cable system.

(c) A cable operator who seeks to assign or transfer control of a cable system is required to certify to the local franchise authority that the proposed assignment or transfer of control of such cable system will not violate the three-year holding requirement. Such certification shall be submitted to the franchise authority at the time the cable operator submits a request for transfer approval to the local franchise authority. If local transfer approval is not required by the terms of the franchise agreement, certification of compliance with the three-year holding requirement must be submitted to the franchise authority no later than 30 days in advance of the proposed closing date of the transfer or assignment.

(1) Receipt by the local franchise authority of a certification containing a description of the transaction and indicating that the cable system has been owned for three or more years, or that the transferor has obtained or is seeking a waiver from the Commission, or that the transaction is otherwise exempt under this section, shall create a presumption that the proposed assignment or transfer of the cable system will comply with the three-year holding requirement.

(2) A franchise authority that questions the accuracy of a certification filed pursuant to this section must notify the cable operator within 30 days of the filing of such certification, or such certification shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonable requested by the franchise authority within 10 days of such request.

(d) If an assignment or transfer of control involves multiple systems and the terms of the transaction require the buyer to subsequently transfer or assign one or more such systems to one or more third parties, such subsequent transfers shall be considered part of the original transaction for purposes of measuring the three-year holding period.

(1) In order to qualify as part of the original transaction, a request for approval of the subsequent transfer must be filed with the local franchise authority within 90 days of the closing date of the original transfer and the closing date of the subsequent transfer must be no later than 90 days following the grant of transfer approval by the local franchise authority.

(2) If local transfer approval is not required by the terms of the cable franchise agreement, then a subsequent transfer must be completed within 180 days of the date of the closing of the original transaction in order to qualify as part of the original transaction.

(3) If a subsequent transfer involves transfers of multiple systems to the same party, at least one of which requires local transfer approval and at least one of which does not require local transfer approval, the subsequent transfer must then be closed within 90 days of the date the last system involved in the subsequent transfer receives franchise authority approval of the transfer.

(e) Paragraph (a) of this section shall not apply to:

(1) any assignment or transfer of control of a cable system that is not subject to Federal income tax liability under the Federal Income Tax Code;

(2) any assignment or transfer of control of a cable system required by operation of law or by any act, order or decree of any Federal agency, any State or political subdivision thereof or any franchising authority;

(3) any assignment or transfer of control to one or more purchasers, assignees or transferees controlled by, controlling, or under common control with, the seller, assignor or transferor.

(f) Paragraph (a) of this section shall not apply to any assignment or transfer of a cable system subject to paragraph (e) of this section.

(g) The Commission will consider requests for waivers from the three-year holding requirement and, consistent with the public interest, will grant waivers in appropriate cases of default, foreclosure and financial distress. Waiver requests under this section should be filed in accordance with the special relief procedures set forth in Section 76.7. Waivers granted by the Commission will not become effective, however, unless local franchise authority approval of a transfer is obtained when such approval is required by the terms of the franchise agreement or state or local law.

(1) The Commission will look favorably upon waiver requests involving multiple system operators or transfers of multiple systems if at least two-thirds of the subscribers of the system being transferred are served by systems owned by the cable operator for three-years or more.

(2) Conditioned upon receipt of local franchise authority transfer approval, where such approval is required by the terms of the franchise agreement or applicable state or local law, transfers of cable systems serving 1,000 or fewer subscribers shall be subject to a blanket Commission waiver.

(h) A cable operator may seek Commission review of a franchise authority's decision regarding the application of the three-year holding period to a particular transaction pursuant to the special relief procedures set forth in Section 76.7.

(i) A cable system operator seeking to assign or transfer a cable system it has held for three or more years must submit a completed copy of FCC Form 394 to the local franchise authority if franchise authority approval of the transfer is required by the terms of the franchise agreement.

(1) A franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information

required by the terms of the franchise agreement or applicable state or local law to act upon such transfer request.

(2) If the franchise authority fails to act upon such transfer request within 120 days, such request shall be deemed granted unless the franchise authority and the requesting party otherwise agree to an extension of time.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FCC 95-41

In the matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-61
Commission's Rules to Adopt	)	
Regulations for Automatic	)	
Vehicle Monitoring Systems	)	

REPORT AND ORDER

Adopted: February 3, 1995 **Released: February 6, 1995**

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioner Barrett dissenting and issuing a statement; Commissioners Ness and Chong issuing separate statements.

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I. INTRODUCTION

1. In this Report and Order, we adopt rules for the future licensing and continued development of a number of services and equipment using the 902-928 MHz band. In recent years, Automatic Vehicle Monitoring (AVM) systems and unlicensed Part 15 devices have developed and proliferated in this band and are providing services that are valuable and in the public interest. These services range from licensed vehicle location and automatic toll collection systems to unlicensed devices used for utility meter reading and inventory control. Our allocation plan for the 902-928 MHz band includes 8 MHz of additional spectrum for AVM services and establishes new provisions for governing the interference obligations of Part 15 and amateur operations in this band. This plan balances the differing operational needs of these varied types of uses so that most AVM systems and Part 15 devices will be able to achieve their service objectives without impeding each other's use of the spectrum. We also modify and eliminate outdated regulations that have not kept pace with the technological evolution of AVM and establish a new service, the Location and Monitoring Service (LMS), that both encompasses the old AVM service and future advanced transportation-related services.

2. A key feature of our new spectrum allocation plan is the establishment of separate sub-bands for licensed LMS uses. We have provided three sub-bands for exclusive licensing of wideband "multilateration" LMS systems in addition to two sub-bands for the sharing of narrowband "non-multilateration" LMS systems. Subject to grandfathering certain existing AVM licensees, mutually exclusive applications for multilateration LMS licenses in the three sub-bands will be resolved through competitive bidding. We also clarify the status of licensed systems in the 902-928 MHz band in relation to other uses of the band, with distinctions made for amateur radio and unlicensed Part 15 users operating under certain, specified parameters. The new band plan, combined with the provisions for continued amateur and unlicensed Part 15 operation, will allow efficient and competitive use of the spectrum. Our decisions herein also provide certainty for all users of the band so they can invest in the equipment and facilities necessary to bring quality, low cost services to consumers.

II. BACKGROUND AND EXECUTIVE SUMMARY

3. The Commission initiated the AVM service in 1974, when it adopted its Report and Order in Docket No. 18302.[1] In the 1974 Order, we found that AVM had the potential to accommodate a number of important functions, such as tracking and monitoring large fleets of vehicles and providing information to allow more efficient use of vehicles through better dispatch and routing information.[2] We also noted that AVM systems had already been

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[1] Report and Order, Docket No. 18302, 30 RR 2d 1665 (1974) (1974 Order).

[2] Id.

operating for several years on an experimental and developmental basis, allowing us to gain valuable information regarding advances in AVM technology.[3] While recognizing the technological progress made by AVM, we concluded that development of new vehicle monitoring technologies was also likely in the future, making it inadvisable to adopt permanent rules until more information was available regarding the viability of such new technologies. Accordingly, we decided to provide for the licensing of AVM systems on both a permanent and a developmental basis under "interim" rules.[4] These rules have remained in effect until now.

4. Our 1974 AVM rules provide for licensing of AVM systems in the 903-912 and 918-927 MHz bands, as well as in several bands below 512 MHz. While little licensing of AVM has occurred below 512 MHz, there has been significant AVM use of the 900 MHz bands in recent years. Existing AVM systems in these bands generally fall into one of two broad technological categories: multilateration systems and non-multilateration systems. Multilateration systems use spread-spectrum technology to locate vehicles (and other moving objects) with great accuracy throughout a wide geographic area. This technology is used, for example, by trucking companies to locate and track their vehicle fleets, by municipal governments to pinpoint the location of their buses,[5] and by entrepreneurs who are developing subscriber-based, stolen vehicle recovery systems.[6] Non-multilateration systems use narrowband technology to transmit data to and from vehicles passing through a particular location. This technology is now providing valuable services to state and local governments operating various types of automated toll collection systems -- with an estimated 500,000 cars currently served by such systems[7] -- and by the railroad industry in the monitoring of their

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[3] The Commission first licensed AVM on a developmental basis in 1968. In 1972, the Commission sought additional information on the development of AVM since its original inquiry and proposed to adopt rules for permanent licensing. See Further Notice of Inquiry and Notice of Proposed Rule Making, Docket No. 18302, 35 FCC 2d 692 (1972).

[4] 1974 Report and Order at para. 5.

[5] See Joe Dysart, *Bus 54, Where are You? Automatic Vehicle Locator System Used by Baltimore Mass Transit Administration*, Mass Transit (July 1991).

[6] See Teletrac petition at 6-14.

[7] Moshe Ben-Akiva et al, *The Case for Smart Highways; Intelligent Vehicle-Highway Systems*, Technology Review (July 1992) (noting that electronic toll collection devices have already been implemented in Dallas, Oklahoma and Louisiana); Terry Sweeney, *Wireless Net to Keep Traffic, Tolls Flowing*, Communications Week (Feb. 8, 1993) (describing plans for a California toll collection system, which is expected to reduce traffic, fuel costs and air pollution). Drivers simply purchase an electronically encoded tag that allows them to drive at a normal speed through the toll station. Electronic readers transmit a radio signal to passing cars, debiting the tag or recording the identification of the tag for monthly billing. Id.; *For Whom the Card Tolls*, Electronics (July 25, 1994) at 9 (noting that 500,000 cars take advantage of automated toll systems).

systems' railway cars.[8]

5. It is expected that in the coming years both types of LMS systems will play an integral role in the development and implementation of the variety of radio advanced transportation-related services, known as "Intelligent Vehicle Highway Systems" (IVHS) or "Intelligent Transportation Systems" (ITS).[9] The ITS is a collection of advanced radio technologies that promise to improve the efficiency and safety of our nation's highways, reduce harmful automobile emissions, promote more efficient energy use, and increase national productivity.[10] For example, it is anticipated that ITS systems will increase traffic mobility and efficiency by notifying motorists of traffic delays and recommending alternate routes, adjusting the settings of traffic signals to prevent anticipated traffic jams, and providing navigational assistance to direct a car to its destination according to the most efficient route. ITS warning systems can also be used to notify drivers of impending collisions (or even take control of the vehicle to avoid a collision), and display electronic traffic and safety signals on a car's windshield when poor weather conditions impair drivers' vision of road-side signs. It is estimated that ITS will help reduce air pollution caused by automobiles and will cut wasteful fuel consumption. Traffic congestion, which costs the United States $100 billion annually in lost productivity, will also be minimized by innovative ITS traffic management technologies. Finally, ITS is expected to create new economic and employment opportunities. Not all of these services, however, require or rely on the use of the 902-928 MHz band.

6. To recognize the expected growth of ITS, this Report and Order creates a new subpart in Part 90 for Transportation Infrastructure Radio Services (TIRS). The Location and Monitoring Service (LMS), which uses the 902-928 MHz band, constitutes the first service contained within the TIRS category. As we allocate additional spectrum or create new services intended to further the efficiency of the nation's transportation infrastructure,

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[8] See also, comments of Amtech Corporation (Amtech) at 3-5; Mark IV IVHS Division (Mark IV) at 1; and Hughes Aircraft Company (Hughes) at 4.

[9] The term "Intelligent Vehicle Highway System (IVHS)" refers to the collection of advanced radio technologies that, among other things, is intended to improve the efficiency and safety of our nation's highways. Recently, both government and industry entities have begun referring to these technologies by the term "Intelligent Transportation System (ITS)."

[10] See Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 6052(b), 105 Stat. 1914, 2189 (1991) (ISTEA); H.R. Rep. No. 171(I), 102d Cong., 1st Sess. 11 (1991), *reprinted in* 1991 U.S. Code Cong. & Admin. News 1537; IVHS America, Strategic Plan for Intelligent Vehicle-Highway Systems III-31-III-35 (May 1992) (IVHS Strategic Plan). ISTEA calls for the development of a national IVHS program employing advanced traffic management systems, advanced traveler information systems, advanced vehicle control systems, commercial vehicle operations and advanced public transportation systems. ISTEA at §§ 6053-58. Congress also imposed reporting requirements to monitor the progress made in developing and implementing the IVHS program. Id.

these new services will likely be regulated under the TIRS.[11] The TIRS will thus further Congress's goal of encouraging ITS by providing an organized and unified approach towards regulating spectrum for ITS-related services. Today's creation of the TIRS clearly demonstrates this agency's commitment to the continued integration of radio-based technologies into the nation's transportation infrastructure and our commitment to the development and implementation of the nation's intelligent transportation systems of the future.

7. AVM systems share their portion of the 902-928 MHz band with other users.[12] The band is allocated on a primary basis for use by Government radiolocation systems and Industrial, Scientific, and Medical (ISM) equipment, with Government fixed and mobile operations secondary to these users.[13] Amateur Radio Service licensees operate in the entire band, but on a secondary basis to the ISM, Government and AVM users. Part 15 uses are permitted in this band, but are secondary to all other uses, including AVM and amateur operations.

8. In 1989 and 1990, we also modified our rules to permit enhanced operation of spread spectrum-based radio devices throughout the 902-928 MHz band on an unlicensed basis, pursuant to Part 15 of our Rules.[14] Since modifying our rules to provide for enhanced Part 15 operations, a large number of equipment manufacturers and entrepreneurial companies have developed radio devices and implemented radio systems employing spread-sprectrum technology in the 902-928 MHz band. It is estimated that several million Part 15 devices have been sold and are being used every day to provide a wide variety of valuable services to the American public. For example, consumers are now able to purchase cordless telephones operating in the band offering high quality voice operations,[15] wireless local area networks are being implemented in offices and buildings to enable tetherless voice and data

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[11] We recently adopted two proceedings that suggest potential spectrum allocations for ITS-type operations. In the Notice of Proposed Rule Making in ET Docket No. 94-32, we suggest the possible allocation of the 2390-2400 MHz or the 2300-2310 MHz bands for short range ITS services and in ET Docket No. 94-124, we suggest providing 3.2 GHz of spectrum (47.2 - 47.4 GHz, 76-77 GHz, 94.7-95.7 GHz, and 139 -140 GHz) for ITS-related automobile radar technologies.

[12] AVM services are allocated the 903-912 and 918-927 MHz portions of the 902-928 MHz band and are licensed on a shared basis.

[13] For additional information on Federal Government use in this band see Federal Government Spectrum Usage in the 902-928, 2400-2500, and 5725-5875 MHz Bands. This document is available from the National Technical Information Service, Springfield, VA, 22161, NTIS No. PB 93176739.

[14] *See Report and Order,* Gen. Docket No. 87-389, 4 FCC Rcd 3493 (1989) and *Report and Order*, Gen. Docket No. 89-354, 5 FCC Rcd 4125 (1990)).

[15] See Comments of the Consumer Electronics Group at 4.

transmission,[16] and utility companies are now able to read residential utility meters from the street or remote locations using Part 15 radio devices.[17] In addition to the enormous benefits to both businesses and consumers that will result from the continued growth in the use of the Part 15 industry, our nation's economy also benefits due to the continued development of these new, advanced radio technologies by American companies.[18]

9. On May 28, 1992, North American Teletrac and Location Technologies (Teletrac) filed a Petition for Rule Making requesting that we adopt permanent rules for licensing AVM systems.[19] On March 11, 1993, in response to Teletrac's petition, we adopted the Notice of Proposed Rule Making (Notice) in this proceeding to examine the future licensing and continued development of AVM systems.[20] In the Notice, we proposed to replace the existing interim rules for AVM with permanent rules. We also proposed to expand the technical parameters of the service to permit locating and monitoring of people and objects, as well as vehicles, and therefore proposed to rename the service as the Location and Monitoring Service (LMS). Additionally, we proposed to allocate the entire 902-928 MHz band for LMS, with separate allocations for multilateration LMS systems and non-multilateration LMS systems. We proposed that all LMS systems operate on a shared basis.

10. In response to our Notice, we received numerous comments and reply comments from LMS service providers, LMS licensees that use LMS systems to meet their own internal needs (such as railroad companies and local government entities), LMS users, manufacturers and users of Part 15 equipment, and Amateur operators. We solicited further comments and reply comments in response to ex parte communications we received.[21] Commenters offered a wide array of suggestions on the many complex issues raised in the Notice. Although we are adopting many of the proposals set forth in our Notice, the comprehensive record developed in this proceeding has led us to modify some of our proposals, especially as they concern the spectrum available for the different types of LMS systems, the licensing procedures for the band, and the general obligations of various users of the band.

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[16] See e.g., Comments of Cylink.

[17] See Ex Parte Comments of Cellnet dated March 15, 1994, at 2.

[18] See Comments of Symbol Technologies at 3-4.

[19] RM-8013, filed May 28, 1992, and placed on Public Notice June 23, 1992, Report No. 1897. Teletrac's request was primarily directed at the tentative nature of "interim" rules as well as the exclusivity of AVM licenses.

[20] Notice of Proposed Rule Making, PR Docket No. 93-61, 8 FCC Rcd. 2502 (1993).

[21] See Public Notice, DA 94-129, PR Docket No. 93-61, 59 Fed.Reg. 7239 (February 15, 1994).

11. Multilateration and non-multilateration LMS systems, amateur operations, and Part 15 devices will all play an important role in providing valuable services to the American public in the coming years. We believe that our decisions in this proceeding recognize this importance and will enable all of these services to make continued use of this spectrum. As detailed in our later discussion, commenters representing each of these services indicate the need for varying amounts of spectrum and varying degrees of interference protection from each other's operations in the band. We have therefore developed a spectrum plan that attempts to accommodate all of these users' requirements. The plan: 1) continues to permit secondary operations by unlicensed Part 15 and amateurs across the entire band, but affords users in these services a greater degree of protection to their operations; 2) enables non-multilateration LMS systems to operate on spectrum separate from multilateration systems; and 3) allocates spectrum on an exclusive basis for multilateration LMS licensees.

12. In this Report and Order we have therefore made the following decisions:

- Change the name of this service from the Automatic Vehicle Monitoring (AVM) to the Location and Monitoring Service (LMS) (see paragraph 1).

- Change the terminology used to refer to the two general categories of LMS technologies from "wideband" and "narrowband" to "multilateration" and "non-multilateration," respectively, (see paragraph 14).

- Permit multilateration LMS systems to locate any object -- animate or inanimate -- ancillary to their primary vehicular location and monitoring services (see paragraph 24).

- Permit LMS systems to transmit and receive status and instructional information, both non-voice and voice, related to the location and monitoring of a mobile unit and permit LMS systems to interconnect with the Public Switched Network (PSN) on a restricted basis (see paragraphs 26-27).

- Expand LMS license eligibility to all entities eligible to be licensed under Part 90 of our Rules and allow service in the 902-928 MHz band to be provided by LMS licensees to both individuals and the Federal Government on a commercial basis to paying subscribers. (see paragraph 28).

- Clarify what constitutes harmful interference to multilateration licensees by unlicensed Part 15 devices and amateur operations (see paragraphs 35-36).

- Allocate an additional 8 MHz of spectrum in the 902-928 MHz band for LMS use, permitting the entire band to be used for this purpose. Adopt a spectrum allocation scheme for the 902-928 MHz band that assigns separate sub-bands for multilateration and non-multilateration operations as follows (see paragraphs 46-49):

Band (MHz)	System License
902.000 - 904.000	Non-multilateration
904.000 - 909.750	Multilateration
909.750 - 919.750	Non-multilateration
919.750 - 921.750	Multilateration and Non-Multilateration
921.750 - 927.250	Multilateration
927.250 - 928.000	Multilateration[22]

- License exclusive multilateration LMS systems within each Major Trading Area (MTA)[23] and four additional MTA-like service areas[24] in the three sub-bands designated above, and resolve mutually exclusive applications through competitive bidding (see paragraphs 50-57).

- Grandfather base stations of multilateration system licensees authorized as of February 3, 1995 and constructed and in operation by April 1, 1996 (see paragraphs 61-64).

- License non-multilateration systems on a shared basis in the three sub-bands designated above (see paragraphs 69-70).

- Allow multilateration licensees to commence operations only after demonstrating interference with Part 15 operations is minimized (see paragraphs 81-82).

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[22] This is not considered a separate sub-band. Each licensee in the 904.000-909.75 MHz, 919.750-921.750 MHz and 921.750-927.250 MHz sub-bands will obtain a narrowband assignment at the top of the 902-928 MHz band for forward link operations, as follows: 927.250-927.500 MHz for the 921.750-927.250 MHz band; 927.500-927.750 MHz for the 919.750-921.750 band; and 927.750-928.000 MHz for the 904-909.750 band.

[23] Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs. See Rand-McNally Commercial Atlas and Marketing Guide, 36-39, (123d ed. 1992). PCIA and Rand McNally have recently entered into an agreement regarding the use of Rand McNally's market area designations (i.e., Basic Trading Areas (BTAs) and Major Trading Areas (MTAs) for the licensing of various mobile radio services. LMS is not covered by this agreement. The listings of the Major Trading Areas, including the counties, parishes and census divisions that comprise each MTA, are available for public inspection in the Office of Engineering and Technology's Technical Information Center, 2nd Floor, 2000 M Street, N.W., Washington, D.C.

[24] The four additional regions are: (1) Guam and the Northern Mariana Islands; (2) the Commonwealth of Puerto Rico and the U.S. Virgin Islands; (3) American Samoa; and (4) Alaska will be treated as a single area separate from the Seattle MTA. This is consistent with our MTA-based service area definitions for broadband PCS (see 47 C.F.R. § 24.102) and for the Commercial Mobile Radio Services.

III. DISCUSSION

A. Definitions

13. In the Notice, we characterized LMS systems as "wideband" and "narrowband." A number of commenters, including Mark IV, Hughes, Amtech, and Pinpoint, suggest that LMS systems should be categorized as either "wide-area" or "local-area" rather than as "wideband" or "narrowband."[25] These commenters state that because some "narrowband" systems require a bandwidth in excess of 2 MHz it would be inappropriate to categorize these systems as narrowband. Teletrac opposes such a change in terminology, claiming that it would be difficult to distinguish wide-area/local-area systems without reference to a specific coverage standard.[26]

14. While we agree that the wideband/narrowband terminology used in the Notice is imprecise and could be misleading, we believe that characterizing systems as "wide-area" or "local-area" could also lead to confusion because not all LMS systems have predetermined service contours. Therefore, to address commenters' concerns, we shall refer to "wideband" pulse ranging systems as "multilateration" systems, and we shall refer to "narrowband" systems as "non-multilateration" systems. We define multilateration systems as systems that are designed to locate vehicles or other objects by measuring the difference of time of arrival, or difference in phase, of signals transmitted from a unit to a number of fixed points or from a number of fixed points to the unit to be located. We define non-multilateration systems as systems that employ any technology other than multilateration technology to transmit information to and from vehicles. Unlike a multilateration AVM system, which determines the location of a vehicle or object somewhere over a wide area, a typical non-multilateration AVM system uses an electronic device placed in a vehicle to transfer information to and/or from that vehicle. When the vehicle passes near one of the system's stations, the station transmits an interrogating signal. The interrogating signal is then either modulated with unit-specific information and reflected back to the station's receiver or the tag transmits its own signal in response to the interrogation. By dividing LMS into the broad multilateration and non-multilateration categories, we adopt a definitional framework that is flexible enough to accommodate all operational modes LMS is anticipated to evolve towards.

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[25] See Mark IV comments at n.2; Hughes comments at 6-7; Amtech comments at n.3; Pinpoint comments at n. 3.

[26] Teletrac reply comments at 31-33.

B. Permanent LMS Operation in the 902-928 MHz Band

15. In addition to the current allocation within the 902-928 MHz band for AVM, this band is currently allocated for Industrial, Scientific, and Medical (ISM) equipment,[27] radiolocation, fixed and mobile by the Federal Government,[28] amateur operations,[29] and unlicensed operation of devices under Part 15 of the Rules.[30] In addition, we have initiated a proceeding exploring the possibility of making the middle portion of the 902-928 MHz band available for non-government wind profiler radar systems.[31] Because of the diversity of services that share this band, many commenters observe that changes in the rules that relate to one group of users could affect the other users of the band. A number of commenters further argue that it is premature to adopt permanent rules for LMS systems because many LMS system operators, Part 15 users, and amateur operators are implementing new technologies.[32] Other commenters urge us to take additional time to study the relative merits of the various services, devices, and technologies; still others argue that changes in the rules should be delayed to permit creation of a technical committee to study the sharing of the band among its various users.[33] Relatedly, the American Radio Relay League (ARRL) filed a petition for rule making, dated January 13, 1994, requesting a primary allocation of 902-904 and 912-918 MHz for the Amateur Radio Service.[34]

16. Notwithstanding these concerns, we believe that delaying implementation of permanent rules for LMS systems could jeopardize the continued development of this service. Although a number of companies have already developed LMS systems and are on the verge

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[27] See 47 C.F.R. § 18.305.

[28] See 47 C.F.R. § 2.106.

[29] See 47 C.F.R. § 97.301.

[30] See 47 C.F.R. §§ 15.243, 15.245, 15.247 and 15.249.

[31] See Notice of Proposed Rule Making and Notice of Inquiry, Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for Wind Profiler Radar Systems, (NPRM/NOI), ET Docket 93-59, 8 FCC Rcd 2546 (1993).

[32] See generally comments of the Telecommunications Industry Association (TIA); the Part 15 Coalition (Coalition); Spectralink, the North American Telecommunications Association (NATA); the Domestic Automation Company (DAC); Itron, Inc. (Itron); Symbol Technologies, Inc. (Symbol); Telxon Corporation (Telxon); Thomson Consumer Electronics (Thomson); Norand Corporation (Norand); and American Radio Relay League, Inc. (ARRL).

[33] Coalition comments at 12; Interdigital comments at 6-7; Spectralink comments at 5; Uniplex comments at 2; and TIA comments at 5.

[34] The Petition for Rule Making filed by the American Radio Relay League, because it involves matters that are under consideration in this docket, was accepted as Comments in this proceeding.

of making services widely available, they argue that uncertainty about possible changes in our rules has deterred or prevented them from committing greater capital or obtaining financing.[35] In addition, LMS equipment manufacturers, state and local government entities, toll road operators, and Part 15 manufacturers and users require regulatory certainty. Further postponement of final decisions regarding our LMS rules would make it difficult for users of the band to plan the long-term development of their products or services.[36] Establishing permanent rules for LMS will also provide opportunities for new entrants into location and monitoring businesses. Accordingly, we find that it is in the public interest and consistent with Commission precedent to adopt permanent rules for location and monitoring services.

17. A number of other commenters argue that even if permanent rules are adopted, the Commission should find a permanent home for some or all LMS systems in another frequency band. For example, Lockheed, a manufacturer of narrowband LMS equipment, argues that the 902-928 MHz band is an inappropriate place for LMS systems and proposes use of the 5.8 GHz band. Saab requests an exclusive allocation in the 2450-2470 MHz band for an Electronic Toll and Traffic Management (ETTM) Service claiming that this is neither a narrow-band nor a wide-band LMS service.[37] The Part 15 Coalition also suggests that LMS services be moved to the 2390-2400 MHz band that is part of the 50 MHz transferred to the FCC by NTIA.[38] Other commenters suggest that we should restrict or eliminate multilateration LMS systems in the 902-928 MHz band and instead promote alternative location technologies such as Global Positioning Satellite (GPS), LORAN, dead reckoning, or cellular systems.[39]

18. We conclude not only that the 902-928 MHz band should continue to be made available for LMS services, but that the 8 MHz within the band not previously allocated to AVM should also now available for LMS. Although prior AVM operation in the band has occurred under interim rules, we have always regarded the band as a permanent home for

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[35] See, for example, Ex Parte Comments of MobileVision dated August 12, 1994 at 2.

[36] Teletrac comments at 4; MobileVision reply comments at 3.

[37] SCG comments at 3-5; Sensormatic comments at 17-20; Part 15 Coalition comments at 13-15; Saab-Scania Combitech (Saab) comments at 11; and Lockheed comments a 4. ETTM systems do fall into the "non-multilateration" LMS category (see para. 14 supra.) and as such are adequately accommodated in our licensing plan.

[38] Comments of the Part 15 Coalition at 8-9; Further Comments of the Part 15 Coalition.

[39] AT&T comments; TIA comments at 2-4; and NATA comments at 11-13.

AVM.[40] The 903-912 and 918-927 MHz segments of this band are currently the only spectrum specifically allocated for AVM use and there exists no other low-cost, consumer-oriented spectrum where AVM service providers operate their systems without facing concerns similar to those present in this band. The 902-928 MHz band is ideally suited for location services due to the propagation characteristics of the band that permit widespread coverage of a market area without the use of an inordinate number of base stations. In addition, while some commenters argue that GPS or terrestrial-based communications systems with location capabilities are more spectrally efficient,[41] we are not persuaded that LMS should be eliminated from the 902-928 MHz band on this basis. The alternative technologies put forward by commenters have disadvantages as well as advantages in comparison to LMS. For example, GPS and LORAN-based systems used in fleet tracking permit a vehicle to determine its location, but a separate communications link is required to transmit this information back to a dispatch location. Similarly, Lojack, Inc. (Lojack) manufactures a vehicle location system that operates on a single channel in the 170 MHz band, but this system requires use of direction-finding antennas to locate the vehicle. By contrast, multilateration LMS systems use larger amounts of spectrum, but can both receive "fixes" on large numbers of vehicles and transmit messages back to such vehicles from a central source -- all within one integrated system.

19. We further conclude that the public will be best served by expanding the current AVM allocation of 18 MHz to include an additional 8 MHz so that LMS will be permitted to use the entire 902-928 MHz band. This will allow development of diverse LMS services and technologies. LMS providers are already developing systems with differing capacities, and future designs may surpass the capacity of systems available today. In addition, we believe that developing a diversity of LMS services is important to promote competition and continued technological advances. Promoting alternative technologies will provide consumers choices of a variety of locating services, enabling them to address their individual communications needs. The demand and need for greater capacity, capability and alternatives will grow. Thus, providing additional spectrum for LMS systems within the 902-928 MHz band allows for development of the full scope of location and monitoring techniques.[42]

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[40] In the Report and Order in Docket 18302, we stated that the interim nature of the rules was to allow continued development of AVM systems under a flexible licensing arrangement and to allow the rules to be fine tuned as additional information is gained regarding the operation of various types of AVM systems. Report and Order, Docket No. 18302, at paras. 5 and 10, 30 RR 2d 1665 (1974).

[41] See Comments of the Portland Amateur Radio Club (PARC), Technology Radio Amateur Club (TRAC), the Part 15 Coalition, Spectralink Corporation (Spectralink), American Telephone and Telegraph Company (AT&T), and NATA.

[42] See Report and Order, Docket No. 18302 at para. 10, 30 RR 2d 1665 (1974).

C. Eligibility and Permissible Uses

20. As discussed in the Notice, LMS systems have the potential to offer a wide array of services that go beyond the mere tracking of vehicles.[43] We therefore proposed to expand the permissible uses of LMS to include the location of all animate and inanimate objects.[44] In addition, we proposed expanding the types of entities eligible to acquire LMS service to include individuals and the Federal Government,[45] and we proposed to allow LMS service to be rendered on a for-profit basis.[46] We requested comment on whether these proposals to expand eligibility and permissible uses would create unacceptable congestion of the 902-928 MHz band.[47]

21. In response to the Notice, providers of multilateration LMS services contend that there are significant potential public benefits to expanding LMS beyond vehicle location alone.[48] Southwestern Bell Mobile Systems (SBMS) urges that the definition of LMS be further expanded to permit messaging and data transmissions to fixed units and units for which location and monitoring is not being provided.[49] Additionally, certain multilateration providers have requested that it be made clear that LMS will be permitted to provide interconnected service to the public switched network (PSN).[50] Other commenters, however, such as IVHS America and the United States Department of Transportation (DOT), argue that LMS should remain primarily a vehicle-oriented service, with an emphasis on ITS-related communications.[51] Part 15 manufacturers and users and amateur operators also contend that expansion of the possible uses of LMS will result in more intensive use of the band, thus leading to severe spectrum congestion.[52]

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[43] Notice 8 FCC Rcd 2502, 2503 (1993).

[44] Id. at para 9.

[45] Id. at para. 7.

[46] Id. at para. 8.

[47] Id.

[48] Teletrac comments at 9-10; MobileVision comments at 41-43; SBMS comments at 3-7; and Location Services comments at 6.

[49] SBMS comments at 3-7.

[50] Ex Parte Comments of MobileVision, Teletrac and Uniplex dated December 12, 1994, at 2.

[51] IVHS America comments at 16; DOT reply comments at 15.

[52] See comments of Sensormatic Electronics (Sensormatic); TIA; the Part 15 Coalition; Interdigital Communications (Interdigital); Spectralink; NATA; DAC; Itron; Symbol; Telxon; Thomson; Norand; the Alarm Industry Communications Committee (Alarm Industry); ARRL; PARC;

22. Commenters also express diverse views on whether LMS licensees should be allowed to provide for-profit service. SBMS and Southern California Gas Company (SCG) support offering multilateration LMS as a subscriber-based private radio service.[53] MobileVision also supports permitting LMS licensees to provide services to paying subscribers, stating that such licensing "recognizes the massive capital cost incumbent in deploying the type of extensive infrastructure required for an LMS system of appropriate scope and scale to effectively serve a market."[54] On the other hand, the American Radio Relay League (ARRL) and the Part 15 Coalition oppose allowing multilateration LMS licensees to provide subscriber-based service.[55]

23. We recognize the concerns of the Part 15 and amateur communities that the expansion of permissible uses of the LMS service will result in more intensive use of the 902 - 928 MHz band. Unfettered interconnection and messaging in the LMS could not only increase the potential for harmful interference to other users of the band, but detract from the intended purpose of the LMS allocation. Based on these concerns, we conclude that while a limited expansion of potential applications of LMS is warranted, operational restrictions should be imposed to maintain the coexistence of the many varied users of the band. We find therefore that it is appropriate to impose: 1) limitations on the provision of non-vehicular location services; 2) restrictions on messaging services and interconnection and; 3) a prohibition against message and data transmissions to fixed units and units for which location and monitoring is not being provided. We believe that these restrictions strike an equitable balance between the needs of LMS service providers and those of the Part 15 users and manufacturers and amateur operators, and additionally ensure that LMS systems are utilized primarily for location service and not as a general messaging or interconnected voice or data service. To ensure compliance with these restrictions, we may request, and licensees shall supply, whatever records or information necessary to demonstrate that these provisions are being followed.

24. Accordingly, we will allow non-vehicular location services to be rendered only by multilateration LMS systems whose primary operations involve the provision of vehicle location services. This limited expansion of permissible LMS uses recognizes the general capability of multilateration systems to cover a wide area and perform location determinations for any type of object within that area. We believe that non-multilateration systems, however, should continue to be used for vehicle monitoring only because the

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and TRAC.

[53] See Comments of SBMS dated June 29, 1993, at 4; and Comments of SGC dated June 29, 1993, at 2-3 ("private carrier" support, but outside of 902-928 MHz).

[54] MobileVision Comments dated June 29, 1993, at 40-41.

[55] See Comments of ARRL dated June 29, 1993, at 11-12; and Comments of the Part 15 Coalition at 16.

spectrum they occupy has a heavier concentration of amateur radio operators, Part 15 devices and Federal Government radiolocation operations than other portions of the band. We are concerned that permitting non-multilateration systems to provide this additional service will cause more intensive use of the sub-band, to the detriment of these other users.

25. While we expand the potential applications of LMS as described above, we decline to allow LMS to be used for the type of messaging proposed by Southwestern Bell. We agree with numerous commenters who argue that creating such a broad messaging and data service would be an inappropriate use of this spectrum.[56] The LMS service is a mobile location and monitoring service. We do not intend to expand use of this band so that it becomes primarily a fixed, point-to-multipoint or point-to-point messaging service. Our rules make adequate provision elsewhere for this type of communications.[57] The 902-928 MHz band, however, is the only allocation for location services that provides sufficient spectrum to accommodate the types of advanced location and monitoring systems currently being implemented. Although there are other methods and spectrum available to determine the location of a unit, these other methods do not offer the same capabilities or potential as systems developed in the 902-928 MHz band.[58]

26. We do not intend for this service to be used for general messaging purposes. Accordingly, we will require that all messaging be associated with the location or monitoring of the vehicle or unit. We will permit communications necessary to provide accurate, timely and complete status and instructional information relating to the vehicle being located or the occupant(s) of the vehicle, including voice communications. Thus, LMS systems will be permitted to transmit status and instructional messages, either voice or non-voice, so long as they are related to the location or monitoring functions of the system. We find that such use of LMS will be invaluable to the implementation of ITS of the future.[59]

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[56] TIA comments at 6; Interdigital comments at 3; Alarm Industry comments at 7; Ademco comments at 4; Consumer Electronics Group of the Electronic Industry Association (EIA/CEG) comments at 5;and Proxim, Inc. (Proxim) comments at 3. Uniplex notes that the NPRM requires that messages be related to the unit being located but urges that tighter restrictions be placed on messages, Uniplex comments at 3.

[57] See generally, Parts 21 and 94 of our Rules, 47 C.F.R. Part 21 and 94.

[58] See para. 18, supra.

[59] Both IVHS America and DOT emphasized the need for sufficient communications capacity to implement ITS services, including Advanced Traffic Management Systems, Advanced Traveler Information Systems, Advanced Vehicle Control Systems, Commercial Vehicle Operations, and Advanced Public Transportation Systems. See comments of IVHS America and DOT. See also Strategic Plan for Intelligent Vehicle Highway Systems in the United States, prepared by IVHS America. Implementation of such an array of ITS services will require substantial communications capacity and a combination of various technologies to provide sufficient location and traffic management information in many different circumstances.

27. In addition, we will permit limited LMS interconnection.[60] We will permit "store and forward" interconnection, where either (1) transmissions from a vehicle or object being monitored are stored by the LMS provider for later transmission over the PSN, or (2) transmissions received by the LMS provider from the PSN are stored for later transmission to the vehicle or object being monitored. We will not permit real-time interconnection between vehicles or objects being monitored and the PSN, except for emergency communications related to a vehicle or a passenger in a vehicle.[61] Additionally, the vehicle or object being monitored may only send or receive real-time interconnected communications to or from entities eligible in the Public Safety or Special Emergency Radio Services[62] or a system dispatch point. Finally, the requirement discussed above that all messages be associated with the location or monitoring of the vehicle continues to apply. We believe these limitations on interconnection will serve to impede the proliferation of interconnected voice and data communications by LMS systems while also providing them the flexibility to better serve the subscribers to the service.[63]

28. Finally, we find it in the public interest to allow LMS licensees to make service available to individuals and the Federal Government in addition to Part 90 eligibles. This step will effectively enable LMS operators to serve all members of the public, thus increasing the potential for the public to benefit from the expansion of ITS services. In addition, because many LMS systems will entail construction of extensive infrastructure over wide geographic areas, we also find it in the public interest to permit LMS to be offered to paying subscribers. By permittting LMS offerings to be structured as commercial subscriber-based service, we afford licensees a realistic means of underwriting system development.

D. Accommodation of Secondary Users in the 902-928 MHz Band

29. As noted above, there are currently five separate user groups sharing the 902-928 MHz band. In addition, the relative hierarchy among these users is well established. The 902-928 MHz band is allocated for primary use by the Federal Government for Radiolocation, Fixed and Mobile services and by users of Industrial, Scientific, and Medical (ISM) devices. Use of the spectrum by government fixed and mobile and AVM systems is secondary to both of these uses. The remaining users of the 902-928 MHz band, licensed amateur radio operators and users of Part 15 equipment, operate on a secondary basis to all

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[60] We note that Part 15 devices performing functions similar or identical to those of licensed LMS operations are not restricted from interconnecting with the PSN.

[61] Emergency communications may include information about a medical condition that requires immediate attention or the mechanical breakdown or failure of an automobile.

[62] See 47 C.F.R. Part 90, Subparts B and C. This would also permit "911" interconnection where this service is available.

[63] See Ex Parte Comments of MobileVision dated December 14, 1994, at 5-6.

other uses, including AVM. In the Notice, we requested comment on whether LMS systems would be able to share the band with these other classes of users. The Notice also sought comment on whether a warning label should be required on LMS instruction manuals, operator manuals, and brochures to warn potential LMS users that LMS systems are secondary to Federal Government users and to ISM equipment.[64] The Notice also requested comment on potential alternatives to LMS sharing with other user categories, "short of removing Part 15 users and amateur operations from the band, restricting where such users could operate in the band, or placing stricter limitations on the operation of such users in this band."[65]

30. The Federal Government and ISM users did not comment on sharing of the band, and LMS manufacturers and users generally did not express concern about continued sharing of the spectrum with either the Federal Government or ISM equipment. The American Radio Relay League (ARRL), however, requests that we provide a primary allocation in a portion of the 902-928 MHz band for amateur operations.[66] The Interagency Group requests that LMS systems providing electronic toll and traffic management (ETTM) services be given co-primary status with Federal Government and ISM users, claiming that this is required to "instill confidence" in ETTM users that their long-term use of this band is assured.[67] We do not believe that these considerations warrant disturbing the primary status of Federal Government and ISM operations in relation to other uses of the band. Therefore, under the rules adopted today, LMS licensees will continue to operate on a secondary basis to Federal Government users and ISM equipment. Further, we conclude that no primary allocation for amateur operations in the requested sub-bands is warranted. Although the ARRL states that there has been "rapid increases in amateur use",[68] that "the Amateur Radio Service is increasingly looking to the 902-928 MHz band,"[69] and that "amateur use of the band has been growing",[70] the only quantitative support that it provides is that there are 16 known manufacturers of amateur equipment for this band and that there are 20 amateur stations in

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[64] Notice at para. 24, 8 FCC Rcd. 2502, 2506 (1993).

[65] 8 FCC Rcd 2502, 2506-2507 (1993), as revised by Erratum, 8 FCC Rcd 3233 (1993).

[66] See footnote 34, supra. The ARRL requests a primary allocation in the 902-904 MHz and 912-918 MHz bands. Also, by letter to Chairman, Reed E. Hundt, dated October 4, 1994, ARRL asks that the Commission not extend any substantive accommodation for Part 15 entities that is not extended as well to the Amateur service.

[67] Interagency Group comments at 11-12.

[68] ARRL Petition for Rule Making at 3.

[69] ARRL Petition for Rule Making at 10.

[70] ARRL Petition for Rule Making at 9.

Rochester, New York using the band.[71] There are, on the other hand, a large number of various uses of this band with quantitatively known combined (and competing) requirements. They include the existence of more than 4 million Part 15 devices and 500,000 non-multilateration LMS tag readers. ARRL's petition thus fails to adequately justify a change in the allocation status for the Amateur Radio Service in any portion of this band.

31. In the Notice, we proposed that a warning label be required on all LMS instruction manuals, operator manuals, and brochures to warn potential LMS users that LMS systems are secondary to Government radiolocation and to ISM equipment and that, as a result, such systems may suffer from "undesired operation." Notice at para. 24, 8 FCC Rcd. 2502, 2506 (1993). We have decided not to require such a warning label. Many wireless telecommunications systems operate on spectrum that is also allocated for other uses and are susceptible to varying degrees of interference. We generally do not place warning labels on these systems. To do so in this instance might unfairly label LMS as an inferior service to other similarly-situated services, quite possibly deterring growth of the service and reducing the likelihood of prompt public benefit from its use. Moreover, LMS providers have an inherent incentive to minimize the deleterious effects of interference to provide reliable service and to attract and retain a loyal customer base. We do warn LMS licensees and users, however, that many LMS systems in the 902-928 MHz band will be sharing the band with one another, and operating on a secondary basis to Federal Government users and ISM equipment. Systems operating in such an environment are always subject to the possibility of interference, and must comply with our criteria for co-channel sharing where applicable.

32. The relationship between LMS, especially multilateration systems, and Part 15 uses of the 902-928 MHz band presents more complex issues, as the comments indicate. There are millions of Part 15 devices in operation throughout the United States today and this number is expected to increase in the future. Because Part 15 devices operate at extremely low power and each has a limited area of operation, the record indicates that they can coexist more easily with non-multilateration LMS systems, which also operate with relatively short range.[72] Conversely, Part 15 commenters generally contend that they will not be able to effectively share the spectrum with multilateration LMS systems.[73] These commenters believe that Part 15 devices and multilateration LMS cannot coexist in the same band because the high power multilateration transmissions will overpower and desensitize their low power,

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[71] ARRL Petition for Rule Making at note 18.

[72] Ex Parte Comments of Amtech dated March 29, 1994, at 8-9.

[73] See Ex Parte Comments of Ademco dated March 15, 1994 at 5-11; Ex Parte Comments of Part 15 Coalition dated August 12, 1994 at 3; Ex Parte Comments of the Ad Hoc Gas Distribution Utilities Coalition dated August 12, 1994 at 7; Ex Parte Comments of Itron dated August 12, 1994 at 1.

unlicensed operations.[74] Additionally, Part 15 commenters believe that with unrestricted use of high power services, the noise floor will increase throughout the band. They claim that this increase of noise in the band, without a limitation in the power and location of the multilateration transmissions, would make their sensitive receivers -- which must accurately detect low-power signals -- obsolete and unusable anywhere in the 902-928 MHz band.[75] Multilateration LMS commenters argue that operation of some Part 15 devices is likely to cause harmful interference to LMS systems. Examples of potential interference sources identified by multilateration operators include anti-shoplifting field disturbance sensors that operate under Section 15.245 of the rules and certain video links that operate under Section 15.249 of the rules.[76] Multilateration parties also contend that harmful interference is likely to be caused by Part 15 devices that either transmit continuous signals or transmit from antennas placed at relatively high out-of-doors elevations. On the other hand, multilateration proponents do not believe that interference is likely to be received from any other type of Part 15 operations.[77]

33. Commenters have suggested a number of solutions to mitigate potential harmful interference, including 1) limiting the permissible uses for the LMS service, 2) moving the LMS service to another band, 3) elevating Part 15 devices to co-equal status with LMS systems, 4) retaining existing rules until a joint technical committee can be established to study the feasibility of sharing, and 5) giving amateur operators primary status in a part of the band.[78] In ex parte comments filed in mid-August 1994, some LMS commenters discussed additional alternatives for continuing to allow Part 15 operations in the 902-928 MHz band while seeking to minimize possible interference to LMS operations. These commenters focused on establishing thresholds that would determine whether Part 15 devices were causing harmful interference to LMS systems, based on criteria such as field strength limits, height of outdoor antennas used by Part 15 devices, the directional gain of antennas associated with Part 15 devices, and the existence of field disturbance sensors operating under Section 15.245 of our rules.[79] Part 15 commenters, however, had little, if any,

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[74] See Ex Parte Comments of the Part 15 Coalition dated August 12, 1994, at 4.

[75] See e.g., Ex Parte Comments of Cellnet & KNOGO dated August 19, 1994, at 3.

[76] Letter from AirTouch Teletrac, Pinpoint Communications, Inc., Uniplex and MobileVision, L.P., to Ralph A. Haller, Chief, Private Radio Bureau, dated June 23, 1994.

[77] See ex parte comments of Teletrac, MobileVision, Pinpoint and Uniplex, dated June 23, 1994 at 5.

[78] See Ex Parte Comments of Metricom and Southern California Edison Company dated August 12, 1994 at 4; Ex Parte Comments of Symbol Technologies at 3-4; Ex Parte Comments of Part 15 Coalition dated August 12, 1994 at 6-7; Petition for Rule Making filed by the American Radio Relay League (ARRL) on January 13, 1994 at 1.

[79] See Further Comments of AirTouch Teletrac, MobileVision and SBMS dated August 12, 1994.

support for these types of interference threshold criteria.[80]

34. We recognize the important contribution to the public that both Part 15 technologies and amateur operators provide in the 902-928 MHz frequency band. For example, Part 15 devices currently operating in the 902-928 MHz band provide valuable services such as automated meter reading, inventory control, package tracking and shipping control, alarm services, local area networks, and cordless telephones. These devices allow businesses to operate more effectively and efficiently, without the regulatory complexities of many licensed services. The amateur service is used by technically inclined private citizens world-wide to engage in self-training, information exchange, and radio experimentation. It is at the forefront of communications technology and has been instrumental in the development of land mobile systems, hand held radios, and satellite communications. In times of disaster when normal communications are disrupted, amateur systems often alert the world to the disaster and provide assistance in relief operations. By the actions in this proceeding we seek to maximize the ability of Part 15 and amateur operations to coexist with the operation of LMS systems.

35. We also conclude that effective sharing of this band between amateur and Part 15 users and multilateration LMS systems does not require a change in the relative status between these two allocations and uses, as some parties have suggested. Rather, we have decided to balance the equities and value of each use without undermining the established relationship between unlicensed operations and licensed services. Thus, we affirm that unlicensed Part 15 devices in the 902-928 MHz band, as in any other band, may not cause harmful interference to and must accept interference from all other operations in the band;[81] persons operating unlicensed Part 15 devices have no vested or recognizable right to continued use of any given frequency;[82] and finally, an operator of an unlicensed Part 15 device is required to cease operations upon notification by a Commission representative that the device is causing harmful interference and may not resume operations until the condition causing the harmful interference has been corrected.[83] Furthermore, the amateur radio service will retain its status as a licensed, secondary service.

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[80] See Ex Parte Comments of ADEMCO, Axxon Corp., C&K Systems, Gas Utilities, ITRON, Metricom & Southern Cal Edison, NavGuard/Summit Telecom, Sensormatic, Symbol Technologies, Tatung Telecom, Teatherless Access, TIA, Uniplex Corp., Utilicom, UTC, WINFORUM and WISE Communications, August 1994.

[81] 47 C.F.R. § 15.5(b).

[82] 47 C.F.R. § 15.5(a).

[83] 47 C.F.R. § 15.5(c).

36. Amateur and Part 15 operations will continue to be secondary to services with a higher allocation status. They may continue to operate as their licenses and/or the rules permit. To accommodate their concerns about their secondary status in light of multilateration LMS, however, we are adopting rules that define and clarify what constitutes harmful interference from their secondary operations. Harmful interference is defined as "(a)ny emission, radiation or induction that endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with this chapter."[84] To promote cooperative use of the 902-928 MHz band we are elaborating on this standard to define what is not harmful interference from both amateur operations and unlicensed Part 15 devices to multilateration LMS systems. This "negative definition" will promote effective use of the 902-928 MHz band by the various services by clearly establishing the parameters under which licensed Amateurs and unlicensed users of Part 15 devices may operate without risk of being considered sources of harmful interference to services with a higher allocation status. Part 15 and amateur operators who voluntarily operate within the following parameters will not be subject to harmful interference complaints from multilateration LMS systems at 902-928 MHz. Thus, we are adopting rules that provide that a Part 15 device will not be deemed to be causing interference to a multilateration LMS system if it is otherwise operating in accordance with the provisions of 47 C.F.R. Part 15 and it meets at least one of the following conditions:

(a) it is a Part 15 field disturbance sensor operating under Section 15.245 of the rules and it is not operating in the 904-909.750 or 919.750-928.000 MHz sub-bands;[85] or

(b) it does not employ an outdoor antenna; or

(c) if it does employ an outdoor antenna, then if

(1) the directional gain of the antenna does not exceed 6 dBi, or if the directional gain of the antenna exceeds 6 dBi, it reduces its transmitter output power below 1 watt by the proportional amount that the directional gain of the antenna exceeds 6 dBi;[86] and
(2) either

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[84] 47 C.F.R. § 15.3(m). See also 47 C.F.R. § 2.1.

[85] SBMS and MobileVision stated they supported this field disturbance sensor limitation as an interference determinant. See Ex Parte Comments of SBMS dated August 12, 1994, and Ex Parte Comments of MobileVision dated August 12, 1994. Multilateration entities concur that the majority of interference complaints from Part 15 devices concern field disturbance sensors and long range video links. See the LMS Consensus Position on Part 15 Interference dated June 22, 1994; see also the Ex Parte Letter from Teletrac to the Chief, Private Radio Bureau, dated June 21, 1994.

[86] See 47 C.F.R. Section 15.247.

(A) the antenna is 5 meters or less in height above ground; or
(B) the antenna is more than 5 meters in height above ground but less than or equal to 15 meters in height above ground and either:
(i) adjusts its transmitter output power below 1 watt by 20 log (h/5) dB, where h is the height above ground of the antenna in meters; or
(ii) is providing the final link for communications of entities eligible under Subparts B or C of Part 90 of the rules.

Amateur operations in this band meeting these same parameters concerning antenna location, gain, and height as well as transmitter output power will also not be considered as sources of harmful interference. Conversely, Part 15 and Amateur operations not meeting these parameters and seriously degrading, obstructing or repeatedly interrupting the operation of a multilateration system, will be deemed to be causing harmful interference and, thus, upon Commission notification, be required to cease operations until the condition causing the interference has been corrected. We emphasize, however, that Part 15 or Amateur use is not restricted from operating beyond these parameters. Part 15 and Amateur operations can continue to operate as long as interference is not caused and are limited only by the technical parameters contained in the rules applicable to their respective services.

37. We agree with SBMS that the appropriate threshold for determining that Part 15 devices are presumptively not causing harmful interference to multilateration LMS systems is whether they are operating above 1 watt, because 1 watt "is approximately the level at which some current LMS devices transmit, and is well above most cordless phones and other personal Part 15 devices."[87] Under our rules, the transmitter output power of a Part 15 device is not permitted to be more than 1 watt. An antenna less than 5 meters in height driven by a transmitter with 1 watt or less of output power will only affect LMS operations that are relatively close. A higher antenna, however, has the capability to affect a larger number of LMS operations. This is why, between 5 and 15 meters, we adopt the stated formula to adjust the Part 15 transmitter output power. This assures that between 5 and 15 meters an outdoor antenna has the equivalent effect on multilateration LMS operations of a 5-meter antenna using no more than 1 watt transmitter output power. (We have not applied this sliding power reduction scale to devices directly serves public safety and special emergency eligibles so as to minimize the effect on communications involving the safety of life or property.) Height and transmitter power alone, however, are not the only components of a transmitted signal. The directional gain of the antenna also affects the radiated power, and thus the signal strength at the affected receiver. "If a 6 dBi antenna is used, pointing in the direction of the LMS site, then the received signal level, at the LMS site, will be 6 dB higher than if a 0 dBi antenna were used."[88] We conclude, therefore, that use of a Part 15 outdoor antenna with a directional gain of equal to or less than 6 dBi, or a Part 15 outdoor

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[87] Ex Parte Comments of SBMS dated August 12, 1994.

[88] Ex Parte Comments of MobileVision dated August 12, 1994, at Annex 1, page 4.

antenna with a directional gain of greater than 6 dBi having a proportional transmitter output power reduction, constitutes an appropriate threshold at which there is little likelihood of desensitization of the receiver(s) at an LMS site. Finally, because multilateration entities concur that most Part 15 interference to multilateration LMS systems is likely to be from field disturbance sensors and long range video links,[89] we will not make any presumption of interference-free operations for these devices when they operate in exclusive-use bands.

38. In view of the technical diversity of the many LMS systems in existence and the multiplicity of Part 15 devices that will eventually be placed in operation, we conclude that the above standards will not provide solutions to all interference problems, and this agency may not be able to resolve all interference problems that may arise between unlicensed Part 15 and LMS systems. As such, multilateration LMS systems that experience interference from an amateur or Part 15 transmission may face two different scenarios. Under the first scenario, where the interference is from an amateur or Part 15 system operating within the parameters set forth in paragraph 36, the interference is not considered to be harmful. The multilateration LMS system experiencing the interference has no recourse by way of complaint to the Commission. It may only attempt to resolve the interference by modifying its own system or by obtaining the voluntary cooperation of the amateur operator or Part 15 user. Under the second scenario, where the interference is from an amateur or Part 15 transmission that does not fall within the parameters set forth in paragraph 36, the multilateration LMS system experiencing the interference may have recourse by way of complaint to the Commission if voluntary measures fail to resolve an interference problem.[90] To assure that our limited resources are used efficiently and effectively, the complaint must identify the exact source of the interference. A Part 15 user that is causing harmful interference may resolve such a complaint by voluntarily adhering to the parameters stated above. Alternatively, the Part 15 user causing harmful interference may choose other courses of action, including: (1) reducing power sufficiently to avoid causing harmful interference; (2) lowering antenna height sufficiently to avoid causing harmful interference; (3) changing antenna directionalization to avoid causing harmful interference; (4) any combination of 1-3; (5) reaching an accord with the complaining LMS system; or (6) terminating operations. We do not envision readily solving all interference problems because of the technical diversity of the many LMS systems in existence and the multiplicity of Part 15 devices in operation, but believe that the vast majority of equipment and services can operate successfully in this band.

39. We believe that the procedures described above afford the best opportunities for amateur, Part 15 and multilateration LMS operations to coexist in the 902-928 MHz frequency band. Manufacturers of Part 15 devices whose equipment may cause harmful interference to multilateration systems may choose to restrict the operating frequency of their

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[89] See the LMS Consensus Position on Part 15 Interference dated June 22, 1994; see also the Ex Parte Letter from Teletrac to the Chief, Private Radio Bureau, dated June 21, 1994.

[90] See footnote 210 for a discussion of the nature of harmful interference to an LMS system.

devices to the 902-904 and 909.750-919.750 MHz sub-bands that will not be occupied by multilateration systems. Additionally, the 2400-2483.5 MHz band may prove to be useful to Part 15 operations that may not be accommodated successfully in the 902-928 MHz band (see discussions of the 2402-2417 MHz band in the Notice of Proposed Rulemaking in ET Docket 94-32).

E. Spectrum Allocation Plan

40. Currently, LMS systems can be licensed on a permanent basis at 904-912 and 918-926 MHz and on a developmental basis at 903-904 and 926-927 MHz.[91] In the Notice, we proposed that LMS systems be licensed on a permanent basis throughout the 902-928 MHz band, and that the band be divided into five sub-bands: 902-904, 904-912, 912-918, 918-926, 926-928 MHz.[92] We further proposed that multilateration systems be licensed in the 904-912 and 918-926 MHz sub-bands and that non-multilateration systems be licensed in the 902-904, 912-918, and 926-928 MHz sub-bands.[93]

41. Most entities providing or developing LMS systems support licensing LMS systems throughout the 902-928 MHz band.[94] Part 15 and amateur operators uniformly oppose our proposal to expand LMS use to all of the 902-928 MHz band. The Part 15 Coalition originally proposed that LMS systems be restricted to the existing two 8 megahertz bands and that each multilateration system be authorized for only 4 MHz each. Other commenters, such as NATA, DAC, and the Alarm Industry, propose that the total amount of spectrum for all LMS services be reduced to 8 MHz.[95] AT&T proposes that LMS systems be licensed only in the two 8 megahertz sub-bands currently allocated for LMS and that the rules be changed to eliminate multilateration systems, permitting only non-multilateration systems in the bands.[96]

42. Teletrac, MobileVision, Location Services, and SBMS support our proposal to

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[91] See Section 90.239 of the Rules, 47 C.F.R. § 90.239.

[92] Notice at para. 15, 8 FCC Rcd 2504 (1993).

[93] Id.

[94] See Teletrac comments at 20; MobileVision comments at 29-32; Mark IV comments at 6; Location Services comments at 4-5; AT/comm comments; Hughes comments at 6-7; Amtech comments at 2; Pinpoint comments at 2-3; and SBMS comments at 10.

[95] NATA comments at 12; DAC comments at 14; Alarm Industry comments at 9.

[96] Comments of AT&T.

create separate sub-bands for multilateration and non-multilateration systems.[97] Amtech and Pinpoint advocate shared use of the entire 902-928 MHz band by both multilateration and non-multilateration systems to maximize the capacity of multilateration systems and provide sufficient spectrum for non-multilateration systems requiring larger amounts of spectrum.[98] Texas Instruments/MFS proposes that multilateration systems be allocated only one 8 megahertz sub-band and that the rest of the band be available for non-multilateration use.[99] IVHS America and the DOT support our proposed division of the band, but would also permit multilateration and non-multilateration systems to have immediate access to each other's spectrum on a secondary basis and, after six years, would allow any unlicensed spectrum to be available for primary use by either multilateration or non-multilateration systems.[100] Mark IV and the Interagency Group would permit only electronic toll and traffic management (ETTM) systems to have access on an equal basis with multilateration systems on the proposed multilateration spectrum.[101] Several commenters have submitted studies to illustrate the difficulties that multilateration and non-multilateration systems would have in sharing the same spectrum.[102] Only two commenters, Amtech and Pinpoint, claim that such sharing is feasible and present a detailed sharing plan.[103]

43. In addition to requesting comment on the appropriate use of spectrum in the 902-928 MHz band for multilateration and non-multilateration LMS systems, we also made proposals and solicited comment on how multilateration systems, in particular, should be licensed. Specifically, we proposed that multilateration systems be licensed on a shared basis in the 904-912 and 918-926 MHz bands and that licensees be responsible for coordinating

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[97] See Teletrac comments at 20; MobileVision comments at 29; Location Services comments at 5; and SBMS comments at 10 [SBMS supports further dividing the sub-bands proposed for use by multilateration systems].

[98] Pinpoint comments at 9; Amtech comments at 7-14. Amtech, in its August 12, 1994 comments, indicates that ". . . at a minimum, the rules should accommodate the use of two 6 MHz channels for read-write tages." Comments at 2.

[99] Texas Instruments Incorporated/MFS Network Technologies, Inc. (TI/MFS) comments at 11-13.

[100] IVHS America comments at 20; DOT reply comments at 16-17.

[101] See Interagency group comments at 11-12; and Mark IV reply comments at 6-8.

[102] Teletrac comments at Appendix 2; MobileVision reply comments at appendix 3.

[103] See Amtech comments at 17-35; and Pinpoint comments at 9-39. Although Mark IV supports permitting co-equal access to spectrum for multilateration and at least ETTM non-multilateration systems, it does not provide a detailed sharing plan and does not evaluate the effects that non-multilateration systems would have on multilateration systems.

among themselves to avoid interference.[104] We also offered an alternative that systems be licensed on an exclusive basis for five years, after which licensing would be on a shared basis with any new licensees required to protect incumbents.[105]

44. Several multilateration parties oppose our proposal to license these systems on a shared basis, claiming that it is not technically or economically feasible to share spectrum on a co-equal basis with other multilateration licensees.[106] Two commenters that are developing multilateration systems, Pinpoint and Uniplex, support shared licensing, albeit on a limited basis.[107] SBMS, while opposing shared use of spectrum for multilateration systems, would divide the two 8-megahertz bands into four 4-megahertz bands licensed on an exclusive basis.[108] The commenters agree that sharing of spectrum among multilateration licensees would require the use of an interference avoidance measure, such as time sharing.[109] Time sharing would reduce system capacity since it requires the use of guard bands and other additional system overhead that represent additional uses of capacity that do not contribute to the content of the message.[110] With each addition of a new multilateration system, the quality of service provided by incumbent operators would diminish due to increases in system delays and time required for a subscriber to access the system.[111] In a shared environment, the multilateration interference tolerance threshold would be more likely to be violated, causing the time of arrival to be distorted for the return signal and therefore, not accurately providing location services.[112] Finally, if there is more than one multilateration system using the same frequency band, it would be extremely difficult to have adequate power control

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[104] Notice at para. 65, 8 FCC Rcd 2502, 2506 (1993).

[105] Id.

[106] Comments of Teletrac at 24-39; Comments of MobileVision at 33-36; Comments of Southwestern Bell Mobile Systems (SBMS) at 12-14; and Comments of Location Services at 4. We hereby grant SBMS's Motion to Accept Supplement to Reply Comments because it serves the public interest and best ensures the proper dispatch of Commission business to develop a full and complete record in this proceeding. See 47 U.S.C. § 154(j).

[107] See Comments of Pinpoint at 9-20; Ex Parte Comments of Pinpoint dated August 3, 1994; Ex Parte Comments of Uniplex dated September 30, 1994 (supporting Pinpoint's August 3, 1994 position).

[108] SBMS comments at 12-14.

[109] See Pinpoint comments at 17.

[110] See Ex Parte Comments of SBMS dated March 29, 1994, at 16-17.

[111] See Ex Parte Comments of Teletrac dated March 15, 1994, at 2, Ex Parte Comments of SBMS dated March 29, 1994, at 16-17.

[112] See Comments of MobileVision at 33-4, Reply Comments of MobileVision at 12-13.

among users from disparate systems. Without adequate power control, overall system capacity would suffer.[113] Sharing could also require the establishment of standards to which all of the systems would have to conform. With different technologies employed by the various systems being proposed, we are not in a position, nor are we inclined, to set such standards. For these reasons, we conclude that sharing in the multilateration segment of this service is neither practical nor desirable from either a technical or regulatory standpoint.

45. Some commenters also provided economic analyses of the impact of sharing on competition in the multilateration LMS market over the long-term.[114] Teletrac opposed sharing, pointing to various substantial fixed costs and technical difficulties to argue that a market with open entry to shared spectrum would not necessarily sustain more than two firms. Teletrac suggested that the close coordination among licensees needed to make sharing spectrum successful could inhibit vigorous competition. Teletrac also argued that exclusive licensing would not allow licensees to exercise market power because of the availability of alternative location services. SBMS, on the other hand, argues that sharing may be economically beneficial because it would encourage competition and technical innovation. SBMS also expressed concern that exclusive spectrum assignments would make the multilateration LMS market a natural monopoly.

46. We believe that both multilateration and non-multilateration systems will play an important role in achieving a nationwide ITS infrastructure and that a sufficient amount of spectrum must be available to enable both types of systems to develop.[115] We also agree with commenters that to enable both multilateration and non-multilateration systems to develop effectively, we should create separate allocations for the two types of systems to the extent possible.[116] Further, we believe that, for the most part, non-multilateration systems can share spectrum with one another if they are separated from multilateration operations (see paragraph 66, infra). Once separated, as discussed earlier, we believe that there are technical, operational and economic justifications supporting our decision to provide exclusive spectrum for exclusive assignments for multilateration systems.

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[113] See Ex Parte Comments of SBMS dated October 19, 1994, Final Report of the Mobile and Portable Radio Research Group at 35.

[114] See Comments of North American Teletrac and Location Technologies, Inc. (Teletrac), Reply comments of Mobilevision, L.P., Pinpoint Communications, Inc., and supplemental reply comments of SBMS.

[115] IVHS America comments at 13-15; DOT reply comments at 12-15.

[116] MFS/TI, in its August 12, 1994 comments suggests that multilateration use, ". . . even on a secondary basis [to non-multilateration use] would prove to be unworkable in day-to-day operations" and could ". . . present an untenable situation for non-multilateration systems with primary use over the band." Comments at 8 and 9.

47. Accordingly, we adopt a spectrum plan that: 1) allocates the entire 902-928 MHz frequency band for LMS systems, generally separating multilateration and non-multilateration operations; 2) allocates spectrum for non-multilateration systems licensed on a shared basis; and 3) allocates spectrum that may be authorized exclusively to a single multilateration licensee.

Spectrum Plan for the 902-928 MHz Band

A:	902.000 - 904.000	Non-Multilateration
B:	904.000 - 909.750	Multilateration
C:	909.750 - 919.750	Non-Multilateration
D:	919.750 - 921.750	Multilateration and Non-Multilateration
E:	921.750 - 927.250	Multilateration
F:	927.250 - 927.500	Narrow band associated with sub-band E
G:	927.500 - 927.750	Narrow band associated with sub-band D
H:	927.750 - 928.000	Narrow band associated with sub-band B

48. Bands B, D and E will be assigned on an exclusive basis to multilateration systems. Bands A, C and D will be licensed on a shared basis to non-multilateration systems. Licensees of Bands B, D and E will be assigned narrow bands H, G and F, respectively. We believe this allocation scheme will significantly increase the diversity of use in the entire 902-928 MHz band, as described below, in furtherance of the public interest. Specifically, the plan provides opportunities for implementation and operation of multiple multilateration technologies and service providers through the allocation of three blocks of spectrum (Bands B and H; E and F; and D and G).[117] The comments indicate that some multilateration systems can operate in roughly 2 MHz,[118] others require 4-6 MHz,[119] and still others need more spectrum[120] to provide effective LMS service. Through this licensing plan, it is our intent to provide a framework for each of these technologies to flourish. For example, systems requiring 2 MHz could be accommodated in Bands D and G, those requiring 4-6 MHz can be accommodated in Bands B and H or Bands E and F, and those requiring additional spectrum will be permitted to aggregate bands to obtain up to a total of 8 MHz in a given region through the aggregation of Bands D and G and Bands E and

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[117] Previously, two 8 megahertz bands had been available for use by multilateration systems. See 47 C.F.R. § 90.239(c).

[118] Ex Parte Comments of SBMS dated August 12, 1994, at 5.

[119] See, e.g., Comments of Teletrac and Mobile Vision.

[120] See, e.g., Ex Parte Comments of Pinpoint, June 27, 1994, at 4 and note 4.

F.[121]

49. The plan also accommodates the needs of non-multilateration systems by providing a total of 14 MHz for such systems rather than the 10 MHz of spectrum proposed in the Notice (see footnote 98, supra). Of this 14 MHz, 10 MHz is contiguous spectrum at 909.750-919.750 MHz that is not shared with multilateration systems, which should address the spectrum requirements of most non-multilateration systems.[122] In addition, non-multilateration systems may obtain up to a 12 MHz block of contiguous spectrum by also using the 2 MHz of spectrum at 919.750-921.750 MHz (Band D). Although this 2 MHz block will be shared on a co-equal basis with multilateration systems, it will nonetheless provide opportunities for non-multilateration systems that require additional spectrum to operate effectively.[123]

F. Geographic Areas for Exclusive Licenses

50. In the Notice, we sought comment on how to license spectrum to multilateration LMS systems.[124] In the Notice of Proposed Rulemaking in PP Docket No. 93-253, we asked for comment on the appropriateness of awarding LMS licenses through competitive bidding.[125] Finally, after adopting the Notice in this docket, we sought specific comment on certain alternative licensing aspects, such as the use of Basic Trading Areas (BTAs) in defining the license service area.[126]

51. Teletrac favors BTAs over MSAs/RSAs for multilateration LMS licensing "because the coverage area customers seek for tracking and emergency services extends

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[121] Licensees may not be authorized to operate on more than one of the multilateration bands in a given MTA, except that they will be permitted to aggregate Bands D and G and Bands E and F.

[122] Mark IV has indicated that its non-multilateration systems can operate in the 912-918 MHz range. Comments of Mark IV dated June 29, 1993, at 8-10. MFS/TI has indicated that "it may be possible for AVI (non-multilateration) technologies to operate in as little as 10 MHz of (contiguous) bandwidth." Comments of MFS/TI dated August 12, 1994, at 8.

[123] See Amtech comments at 9. Amtech states that two-way data transmission between a moving vehicle and a fixed location will require large bandwidths. See also TI/MFS ex parte comments filed December 2, 1993, at 5 and Hughes comments at 6.

[124] See Notice of Proposed Rule Making, PR Docket No. 93-61, 8 FCC Rcd 2502 (1993) at paragraph 21.

[125] See, Notice of Proposed Rule Making, PP Docket No. 93-253, 8 FCC Rcd 7635, para 145, n. 153 (1993).

[126] See Public Notice, DA 94-129, PR Docket No. 93-61, 59 Fed.Reg. 7239 (February 15, 1994).

beyond city limits to the broader metropolitan area where people are likely to commute, conduct business, or routinely drive."[127] SBMS favors MSAs/RSAs over BTAs because, it claims, (1) the Commission has had favorable experience with MSAs/RSAs in licensing cellular systems, (2) BTAs do not coincide with cellular service areas, to the detriment of cellular entities that are would-be LMS providers, (3) MSAs/RSAs are widely known and easily ascertainable, and (4) no private party or entity has ever attempted to control dissemination of maps or listings which depict or define these areas.[128] SBMS also argues that allowing existing licensees to expand to the borders of their BTAs could have anti-competitive implications.[129] Symbol Technologies believes that choosing BTAs for LMS would result in a congruency of service areas for LMS and PCS that would allow LMS providers to be de facto PCS providers and directly compete with PCS.[130]

52. We generally agree with Teletrac's view that the geographic scope of LMS systems logically correlates to areas in which there are centers of consumption of durable goods. We also find, however, that LMS has the potential to serve larger areas; vehicle location and monitoring will be useful for the individual motorist and for fleets of vehicles, and for short-range travel as well as long-range travel. For this reason, we conclude that Major Trading Areas (MTAs) as defined in the 1993 Rand McNally Commercial Atlas and Marketing Guide[131] and four additional MTA-like service areas,[132] unlike the smaller BTAs, provide a more suitable regulatory construct for multilateration licensing. While it is clear that multilateration systems will benefit from being centered upon areas of commerce and trade, use of MTAs will give systems greater capacity to accommodate large numbers of prospective users of location services. This will promote competition, encourage the advancement of new technologies, and result in better and speedier service to the public. We will thus provide for one exclusive multilateration system license in each MTA in the sub-bands identified for exclusive assignments (i.e., Bands B and H, D and G, and E and F). Multilateration licensees on these exclusive assignments will be allowed to construct stations anywhere within their MTAs, subject to technical and operational considerations discussed in paragraph 87-98, infra.

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[127] Comments of PacTel Teletrac dated March 15, 1994, at 8.

[128] Comments of SBMS dated March 15, 1994, at 5. SBMS makes reference to "PCIA, Rand McNally Settle Out-of-Court On Use of BTA/MTA Listings," Washington Telecom Week, February 18, 1994, at 2-3.

[129] Comments of SBMS dated March 15, 1994, at 14-16.

[130] Comments of Symbol Technologies, Inc. in Response to the Public Notice of February 9, 1994, at 7-8 (note 9).

[131] See footnote 23, supra.

[132] See footnote 24, supra.

G. Competitive Bidding for Exclusive Multilateration LMS Licenses

53. In response to the Notice of Proposed Rule Making in PP Docket No. 93-253, we received comment on the issue of whether mutually exclusive applications for AVM systems should be resolved by competitive bidding.[133] Teletrac and SBMS oppose use of competitive bidding to license in this service. These parties contend that the statutory requirement that auctionable spectrum be exclusively assigned and principally used to serve paying subscribers is not met because LMS operations are secondary to ISM and Federal Government use of the band. Amtech and Pinpoint, who oppose competitive bidding for LMS licenses for other reasons, argue that LMS's secondary status does not in and of itself statutorily preclude competitive bidding.

54. In the Second Report and Order in PP Docket No. 93-253, we concluded that it was premature to authorize competitive bidding for AVM systems during the pendency of PR Docket No. 93-61, because "the likelihood of mutually exclusive applications" was unknown or was debated by the commenters.[134] However, in light of our decision to grant exclusive multilateration LMS licenses within three sub-bands, and because they will be used to offer for-profit, subscriber-based services, we conclude that competitive bidding should be used to grant exclusive licenses where mutually exclusive applications are accepted for filing. Use of competitive bidding in such cases meets the general statutory criteria for auctioning licenses set forth in Section 309(j)(2) of the Act.[135] The statute permits auctions where: (1) mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission; (2) the principal use of the spectrum will involve, or is reasonably likely to involve, the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals utilizing the licensed frequencies; and (3) the public interest objectives of Section 309(j) would be served by subjecting mutually-exclusive applications in the service to competitive bidding.[136]

55. We conclude that the above requirements are satisfied, thus making competitive bidding available for licensing within certain band segments. First, in accordance with the statute, the licensing scheme we adopt herein allows for mutual exclusivity among applicants for initial licenses. Specifically, we have rejected the option of allowing multilateration LMS

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[133] Several commenters to that proceeding oppose grant of non-multilateration licenses by competitive bidding. See, e.g., Comments of Hughes Transportation Management, Interagency Group and Amtech.

[134] See Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2351-2, (1994).

[135] See 47 U.S.C. § 309(j)(2). See also H.R. Rep. 111, 103d Cong. 1st Sess. 254 (1993).

[136] A comprehensive discussion of these principles for determining whether licenses may be auctioned is set forth in the Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2398 (1994) at paras. 11-67.

systems to operate in an unlimited shared use environment and have instead decided to grant only one licensee the use of each of three sub-bands for multilateration LMS in each MTA. (see paragraphs 44-46, supra) We do not believe that the likely existence of some grandfathered AVM multilateration operations alters this conclusion. See para. 61, infra. Because no more than one multilateration licensee will be permitted in any single sub-band in an MTA (hereinafter "MTA licensee"), we anticipate that mutually exclusive applications will be filed. We also conclude that the use of the spectrum by other services does not preclude the applicability of the competitive bidding process. Shared spectrum for which we exclude competitive bidding is "where mutual exclusivity between applications cannot exist because channels must be shared by multiple licensees.... [W]e proposed to exclude these services from competitive bidding because there can be no mutual exclusivity."[137] That is not the case here, where in all likelihood there will be mutually exclusive applications for each exclusive MTA license. The relevant statutory prerequisite, as set forth in Section 309(j) of the Budget Act, is that "mutually exclusive applications are accepted for filing." This standard does not require that the relevant spectrum be completely unoccupied by other services.

56. Second, as the statute requires, the "principal use" of the spectrum is reasonably likely to involve MTA licensees receiving compensation from subscribers in return for those subscribers receiving or transmitting signals. We have concluded that this requirement allows us to evaluate classes of licenses, rather than individual licenses, in determining the "principal use" of spectrum.[138] Thus, while MTA licensees may be secondary in the band to government and ISM operations, the "principal use" test, as we have interpreted it, permits us to conclude that the principal uses of multilateration LMS are primarily subscriber-based offerings.[139]

57. In addition, we believe that use of a competitive bidding procedure for the licensing of these services satisfies the public interest objectives for auctioning set forth in Section 309(j)(3)of the Act. Specifically, use of competitive bidding to award MTA licenses, as compared to other licensing methods, will speed the development and deployment of new services to the public with minimal administrative or judicial delays, and encourages efficient use of the spectrum as required by Section 309(j)(A) and (D). Furthermore, in accordance with Section 309(j)(3)(B), we believe that competitive bidding will promote access to multilateration services and technologies and disseminate licenses among a wide variety of applicants by encouraging participation by all interested or qualified bidders. Finally, we conclude that competitive bidding will recover for the public a portion of the value of the

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[137] In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348 at para. 13 (1994).

[138] See Second Report and Order in PP Docket N. 93-253, FCC 94-61, 9 FCC Rcd 2348 at para. 34 (1994).

[139] Comments of Pinpoint at 5; Comments of SBMS at 4.

spectrum, as envisioned in Section 309(j)(3)(C). Specific rules and procedures for competitive bidding for this spectrum, including rules and procedures for designated entities, will be established in a separate proceeding. We will not accept applications for multilateration LMS licenses until after these rules and procedures have been established.

H. Construction Period for LMS Systems

58. In the Notice, we proposed that LMS systems be constructed and placed in operation within eight months of the date a license is granted, which is the current standard for AVM licensees under Part 90.[140] The majority of commenters that addressed this issue support our proposal so long as provision is made for extended implementation periods for local governments or especially large and complex systems.[141] MobileVision supports a five-year construction period with construction benchmarks for multilateration systems but states that eight months is appropriate for non-multilateration systems.[142] SBMS supports a 12-month construction period.[143]

59. Most non-multilateration installations use relatively few transmitters in a limited number of locations. Accordingly, we shall retain the current requirement that these systems be constructed and placed in operation within eight months. We will consider a non-multilateration LMS system to be constructed and placed in operation if at least one base station has been constructed and the system is providing service to at least one mobile radio unit. As they may do currently, a local government entity requiring more than eight months to construct a non-multilateration LMS system because of the system's size and complexity can request extended implementation in accordance with Section 90.155(b) of our Rules.

60. We recognize that multilateration LMS systems, because they will be licensed on an MTA basis, will likely be larger and more complex than non-multilateration LMS systems. Rather than imposing benchmarks and reporting requirements on these systems for all or part of their license term, we will require a multilateration LMS licensee authorized to operate throughout an MTA to construct a sufficient number of base stations that utilize multilateration technology to provide multilateration location service to a substantial portion of at least one BTA in that MTA within twelve months after initial authorization.[144] LMS

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[140] Notice at para. 26, 8 FCC Rcd. 2502, 2507 (1993). See 47 C.F.R. § 90.155.

[141] Hughes comments at 15; Amtech comments at 35-36; Mark IV comments at 14; IVHS America comments at 19; Interagency Group comments at 10.

[142] MobileVision comments at 46-49.

[143] SBMS comments at 22.

[144] This requirement is comparable to the substantial service requirement for 10 MHz PCS licensees set forth in Memorandum Opinion and Order, GEN Docket No. 90-314, 9 FCC Rcd 5108,

systems not constructed and placed in operation in a timely fashion (i.e., within 8 months for non-multilateration systems and within twelve months, as described above, for multilateration systems) will cancel automatically.

I. Grandfathering Provisions for Existing Multilateration AVM Licensees

61. As of February 3, 1995, we will no longer accept applications for the operation of multilateration LMS systems in the 904-912 and 918-926 MHz bands under our current rules. To ensure that our new licensing scheme does not impose undue hardship on existing, operating multilateration AVM systems, we will adopt certain grandfathering provisions which will allow them to continue to operate their systems under the current rules. We will also confer grandfathering provisions on multilateration AVM licensees who have not yet constructed their systems so that such licensees may construct and operate their licensed stations under our newly adopted rules.

62. A grandfathered multilateration AVM station will be considered constructed and placed in operation if it is built in accordance with its authorized parameters and is regularly interacting with one or more other stations to provide location service, using multilateration technology, to one or more mobile units. See 47 C.F.R. § 90.155. Specifically, LMS multilateration stations will only be considered constructed and placed in operation if they are part of a system that can interrogate a mobile, receive the response at 3 or more sites, compute the location from the time of arrival of the responses and transmit the location either back to the mobile or to a subscriber's fixed site. A grandfathered multilateration AVM station will receive no protection or exclusivity based upon mileage separation or service area criteria, but instead will operate on a co-equal shared basis with stations of any other grandfathered licensee or the exclusive MTA licensee operating in the same sub-band. We have concluded that sharing of spectrum among unlimited numbers of multilateration licensees is not technically feasible (see paragraph 44, supra), and thus we have not adopted rules that would permit the sharing of spectrum among multiple multilateration systems over an entire MTA. However, given the very small number of multilateration licensees currently authorized, in any given MTA there will ultimately be, at most, one or two grandfathered licensees operating in the same spectrum as the eventual MTA licensee. In such limited cases, we expect cooperative arrangements for sharing among these licensees to be reached. Where this is not possible or achieved, MTA licensees may build their systems in areas geographically removed from grandfathered stations, or may attempt to acquire existing systems from the grandfathered licensee(s) in their licensed area.

63. To attain grandfathered status, existing multilateration AVM licensees must file, within thirty days of the effective date of the rules adopted in this Report and Order, applications to modify their licenses to comply with the new band plan. These applications to modify must identify which new sub-band or sub-bands (i.e., Band B and H, Band D and

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¶ 155 (1994).

G, or Band E and F) they intend to operate their licensed multilateration AVM stations in, once their applications to modify have been authorized. We will not restrict multilateration AVM licensees to selecting a particular sub-band or sub-bands for their modified authorization, but will permit these licensees to choose the spectrum band(s) -- not to exceed a total of 8 MHz -- that best meets with their future LMS requirements. The application to modify a license to comply with the new band plan may also include a modification to specify an alternate site, so long as the alternate site is 2 kilometers or less from the site specified in the original license.[145] Further, at the time that existing multilateration AVM licensees file these applications to modify, they must certify that either (1) their multilateration AVM system has been constructed and is operational as of February 3, 1995, or (2) that it is not constructed at that time. Multilateration AVM systems that are constructed and operational as described above will be given until April 1, 1998 to convert to the spectrum identified in their modified LMS system license. Such licensees may continue to operate their multilateration AVM systems under either the old rules or the new rules during the process of converting their systems during this period. Licensees of constructed and operational multilateration AVM systems that do not file applications to modify within this 30-day period will be permitted to continue operations under the provisions of Section 90.239 until April 1, 1998 or the end of their original license term, whichever occurs first, at which time such licenses will cancel automatically and will not be renewed.

64. Multilateration AVM licensees for stations not constructed as of February 3, 1995 must construct and operate their modified LMS systems on the spectrum identified in their modified LMS system license by April 1, 1996. These licensees will not be allotted the lengthy transition period that licensees of constructed and operational systems are provided (i.e., until April 1, 1998) because they do not have an existing, operating infrastructure that will require this additional time for conversion. Licenses for stations not constructed under the old rules as of February 3, 1995 will terminate 30 days after the effective date of the new rules unless timely applications to modify are filed. Parties may file applications to modify those licenses that they plan to construct by April 1, 1996.[146] We have provided a transition period that we believe is appropriate for construction and operation for current licensees to attain grandfathered status. Because this spectrum will be subject to competitive bidding, we must balance our wish to accommodate the desired construction schedules of existing multilateration AVM licensees against the need for prospective bidders to be able to evaluate the likely value of the spectrum upon which they will be bidding.

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[145] See generally Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, Third Report and Order, FCC 94-212, released Sept. 23, 1994, at para. 356.

[146] We note that Airtouch and Mobilevision have offered to limit the number of licenses they construct to 20 percent of the unbuilt licenses they hold. While we are not adopting this 20 percent limit, we expect all licensees to file modification applications only for those unbuilt licenses that realistically can be constructed by April 1, 1996. If the number of modification applications submitted significantly varies from the number built, we will consider appropriate measures.

J. Licensing of Non-Multilateration Systems

65. We proposed that non-multilateration systems be licensed in the 902-904, 912-918, and 926-928 MHz bands.[147] Mark IV believes that 6 MHz of contiguous spectrum at 912-918 MHz is sufficient for its type of system.[148] MFS Network Technologies/Texas Instruments recommend 12 or 14 MHz of contiguous spectrum for non-multilateration systems, but indicate that 10 MHz may be sufficient.[149] Amtech states that a minimum of 12 MHz of contiguous spectrum is required for non-multilateration systems, because these systems need 6 MHz wide channels and two such channels are necessary for high-speed operation at most toll booth locations.[150]

66. We also proposed that non-multilateration systems be licensed on a shared basis with licensees responsible for coordinating use to avoid interference.[151] Lockheed proposes licensing of non-multilateration systems based on a fixed mileage separation.[152] Mark IV supports the use of frequency coordinators to coordinate the assignment of spectrum.[153] NABER proposes that it be designated as the frequency coordinator for non-multilateration LMS systems.[154] We are adopting our proposal to license non-multilateration LMS systems on a shared basis because these systems generally cover relatively short distances, and licensing based on a fixed mileage separation would limit re-use of spectrum and thereby limit the potential uses of these systems. We also decline to designate a frequency coordinator for this service. Many non-multilateration licenses have been issued and many stations have been placed in operation without such a formal coordination process and there appear to be no negative consequences. Considering the limited coverage of these systems and the expanded amount of spectrum available under the allocation plan we have adopted, it should not be difficult for non-multilateration systems to share their sub-bands.

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[147] Notice at para. 25, 8 FCC Rcd. 2502, 2507 (1993).

[148] Comments of Mark IV IVHS Division dated June 29, 1993, at 8.

[149] Ex Parte Comments of MFS Network Technologies/Texas Instruments dated August 12, 1994.

[150] Ex Parte Comments of Amtech dated August 12, 1994.

[151] Notice at para. 25, 8 FCC Rcd. 2502, 2507 (1993).

[152] Lockheed comments at 4. Mark IV supported a fixed milage separation in its comments but modified its support in reply comments. Mark IV comments at 8-9, reply comments at 8.

[153] Mark IV reply comments 8-10.

[154] NABER comments at 6-7.

67. The Interagency Group, with the support of Mark IV, proposes that local governments be able to obtain blanket licenses for non-multilateration systems.[155] We decline to adopt a blanket licensing scheme for non-multilateration systems. In a shared use environment, it is important that applicants and other co-channel users know exactly where systems are located if they are to avoid interference. If we issue blanket licenses, it will be difficult for the Commission or the public to ascertain the exact location of LMS transmitters.

68. Finally, we proposed that existing non-multilateration systems licensed to operate in spectrum allocated for use by multilateration systems be required to move their operations within three years of the effective date of any new rules.[156] SBMS and Location Services support this proposal.[157] Both Teletrac and Amtech favor grandfathering existing non-multilateration systems, although Teletrac would only do so for systems licensed prior to the initiation of this proceeding.[158]

69. As discussed earlier, we have modified our proposal to provide for shared use of the 902.000-904.000 and 909.750-921.750 MHz bands by non-multilateration LMS systems, thus allocating a total of 14 MHz that will be available for non-multilateration operations. Although a non-multilateration licensee could be required to share 2 MHz of this spectrum (at 919.750-921.750 MHz) with an MTA multilateration licensee, we believe that the benefit to those non-multilateration systems requiring a minimum of 12 MHz of contiguous spectrum to operate remains substantial and warrants this overlap.

70. In addition, because we have concluded that sharing between multilateration and non-multilateration systems is generally inadvisable (see paragraph 46, supra), we are requiring that licenses for non-multilateration systems in spectrum other than the 902.000-904.000 and 909.750-921.750 MHz bands must be modified by April 1, 1998, to specify operation solely in those bands and to operate consistent with the rules we are adopting by this Report and Order. This is consistent with our decision to require multilateration systems to relocate their operations within the same time period. Similarly, authorizations not so modified within this period will cancel automatically.

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[155] Comments of Interagency Group at 12; Reply Comments of Mark IV at 6-8.

[156] Notice at para. 16, 8 FCC Rcd. (1993).

[157] SBMS comments at 12; Location Services at 5.

[158] Teletrac comments at 22-23; Amtech comments at 36-38.

K. Multilateration System Operations

71. From review of the lengthy record in this proceeding, we have determined that multilateration systems have two distinct methods of operation. One type of multilateration system utilizes a low power, wideband location pulse originating from the mobile units and a high powered, narrowband interrogation and control signal emanating from the fixed/base stations. These systems also utilize narrowband transmissions, within the band that is used for the location pulse, for two-way voice and data communications between fixed/base stations and mobile units. Another kind of multilateration system operates in a different manner, utilizing wideband transmissions for: the location pulse from the mobiles, the interrogation and control signal from the fixed/base stations and the two-way messaging between the fixed/base stations and the mobile units. As we understand these two types of multilateration systems, there are three basic elements used to accomplish location and monitoring functions: forward links, reverse links and communication links. Forward links originate at the fixed/base site and are used to control and interrogate mobile units. In contrast, reverse links are signals transmitted from the mobile units or fixed station to fixed/base stations to determine the location of the mobiles or from fixed stations to other fixed/base stations for system synchronization and testing purposes. Communication links connect fixed/base stations and mobile units and are utilized for two-way messaging related to the location or monitoring functions of the system. In addition, multilateration systems use these three basic elements either in what we will refer to as the "narrowband" or the "broadband" portion of the LMS band. The narrowband portion we will define as the 250 kHz sub-bands (i.e., the sub-bands 927.250-927.500, 927.500-927.750 and 927.750-928.000 MHz) and we will define the broadband portion as the sub-bands 904.000-909.750, 919.750-921.750 and 921.750-927.250 MHz. Each of the three basic elements are discussed below in accordance with their location in the narrowband or broadband portion of the LMS band, along with how they are considered in our overall regulation of multilateration systems.

Narrowband Segment

a) Narrowband Forward Links

72. In the Notice, we observed that many multilateration systems are designed using forward links to contact units to be located.[159] Consistent with existing systems, we proposed that multilateration licensees authorized to operate in the 904-912 MHz sub-band be licensed to operate their forward links in the 250 kHz of spectrum between 924.890 and 925.140 MHz and that multilateration licensees authorized to operate in the 918-926 MHz sub-band be licensed to operate their forward links in the 250 kHz of spectrum between 904.375 and 904.625 MHz.[160]

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[159] Notice at para. 19, 8 FCC Rcd 2502, 2405 (1993).

[160] Notice at para. 19, 8 FCC Rcd 2502, 2505 (1993).

73. Teletrac is the only commenter that supports the proposed location of the forward links, claiming that it will be adversely affected otherwise because its systems now employ forward links in the manner proposed in the Notice.[161] MobileVision favors placing the forward links within a licensee's authorized sub-band rather than in the other multilateration LMS sub-band as proposed.[162] Location Services proposes keeping the forward links in the opposite sub-band but would move the links to the edges of each sub-band.[163] SBMS prefers that the forward links be placed as far from wideband frequencies as practical and assigned exclusively.[164] Pinpoint prefers a wideband forward link that operates over an entire multilateration system sub-band.[165] Amtech recommends placement of the forward links at the edges of the 902-928 MHz band or make licensees use alternative spectrum for forward links, such as common carrier or private carrier paging spectrum.[166] Symbol, ITRON and TIA urge that multilateration LMS forward links be placed at the upper edge of the 902-928 MHz band if Part 15 devices are to be accommodated.[167] Other Part 15 commenters expressed fear of being "drowned out" by high powered forward links, particularly wideband forward links.[168]

74. Although there is no identification of forward links in our current rules, we will define a forward link as any signal transmitted to a mobile unit to be located by a multilateration LMS system."[169] We will also dedicate a portion of spectrum in the 902-928 MHz band where narrowband forward links may be used by the multilateration systems that require them for their operations. Thus, in accordance with our band plan for multilateration systems, multilateration licensees will be authorized to use only the following spectrum for narrowband forward links:

The 904.000-909.750 MHz band narrowband forward link is 927.750-928.000 MHz
The 919.750-921.750 MHz band narrowband forward link is 927.500-927.750 MHz

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[161] Teletrac Comments at 51, Reply Comments at 33-35.

[162] MobileVision Comments at 43-44.

[163] Location Services Comments at 5-6.

[164] Ex Parte Comments of SBMS, dated August 12, 1994.

[165] Ex Parte Comments of Pinpoint dated September 19, 1994, Ex Parte Comments of Pinpoint dated September 15, 1994.

[166] Amtech Comments at 31-32.

[167] Further Comments of ITRON, Symbol and TIA dated August 12, 1994.

[168] See Itron comments, dated August 12, 1994.

[169] See Section 90.7 of our rules.

The 921.750-927.250 MHz band narrowband forward link is 927.250-927.500 MHz

The placement of narrowband forward links at the upper edge of the 902 to 928 MHz band meets the requirements of the majority of the multilateration industry and also accommodates the needs of Part 15 interests.[170] We have provided the flexibility requested by these various commenters, with two of the narrowband forward links placed in spectrum apart from the licensee's multilateration sub-band (e.g., the 927.50-927.75 and 927.75-928 MHz forward links) and the third forward link (927.25-927.50 MHz) placed adjacent to its related multilateration sub-band.

75. Based upon comments from entities that employ narrowband forward links, we believe that 250 kHz for each multilateration system is a suitable amount of spectrum for narrowband forward links.[171] Furthermore, because narrowband forward link transmissions will be situated in the uppermost portion of the 902-928 MHz band -- and thus somewhat removed from the operations of other licensed and unlicensed services in the band -- a relatively greater power level for this use should be permitted. We therefore will allow narrowband forward links to operate with a maximum power of 300 watts ERP.

Broadband Segment

a) Wideband Forward Links

76. Pinpoint and Uniplex have expressed interest in employing a wideband forward link, which, like the narrowband forward link, would be used to communicate with mobile units. However, unlike the narrowband forward link, a wideband forward link could operate over a multilateration system's entire authorized sub-band.[172] Part 15 users uniformly oppose this request on the grounds that such transmissions are likely to cause interference to Part 15 devices. Itron, for example, points out that the high powered wideband forward link could adversely affect the operations of Part 15 devices because it would "present an essentially constant signal at any particular geographic location."[173] Pinpoint, however, asserts that its

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[170] Ex Parte Comments of Teletrac dated August 12, 1994; Mobilevision Comments at 43-44; Location Services Comments at 5-6; Ex Parte Comments of Southwestern Bell dated August 12, 1994; Amtech Comments at 31-32; Further Comments of ITRON, Symbol and TIA dated August 12, 1994.

[171] Ex Parte Comments of SBMS dated August 12, 1994, Ex Parte Comments of Teletrac dated August 12, 1994, Ex Parte Comments of MobileVision dated August 12, 1994.

[172] Ex Parte Comments of Pinpoint dated September 19, 1994, Ex Parte Comments of Uniplex dated September 30, 1994.

[173] See e.g., Ex Parte Comments of ITRON Inc. at p. 3, dated August 12, 1994 and Symbol Technologies, dated August 12, 1994.

system, which is based on the use of the wideband forward link, would pose far less of an interference threat to users of the 902-928 MHz band than that caused by a certain, currently deployed Part 15 data distribution system.[174] We will permit the authorization of wideband forward links, but note that multilateration operations are conditioned on further testing as described in paragraphs 81-82, infra.

b) Reverse Links

77. As discussed above, a multilateration signal transmitted to the fixed/base stations will be referred to as a "reverse link" and is utilized by both types of multilateration systems. These signals are contained within the broadband segment of the multilateration allotment and are primarily location pulses originating from mobile units and used for determination of the position of mobile units. Such transmissions may also originate from other fixed/base stations for the purpose of system synchronization or testing. These transmissions are likely to occur less frequently and more randomly than the above-mentioned forward links and are therefore less likely to cause interference to Part 15 operations. However, as pointed out by one commenter, reverse link transmissions could present significant problems to Part 15 operations depending on the power levels, duty cycles and density of mobile units.[175] Reverse links are an essential part of any multilateration LMS system and therefore must be accommodated. However, in order to limit the potential for interference from such transmissions, we will limit the maximum power level of reverse links to 30 watts ERP. This is a sufficient amount of power to enable mobile units to provide an adequate signal to fixed sites for location, synchronization and testing purposes.

c) Communication Links

78. As noted by multilateration service providers,[176] there is an additional transmission that multilateration systems utilize for two-way messaging that we will refer to as a "communication link." The communication link emanates from the fixed/base stations and mobile units ancillary to the location and monitoring function of the multilateration system and provides status and instructional information relating to the vehicle being located or the occupant(s) of the vehicle. Additionally, these links may be interconnected with the PSN to enable emergency communications.[177] Moreover, the method of transmission of the communication link differs between multilateration systems, the differences centering on the

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[174] See comments filed by Pinpoint Communications, Inc., dated September 19, 1994.

[175] See letter from Metricom, Inc., Alarm Industry Communications Committee, Electronic Industries Association, Itron, Inc., Part 15 Coalition, Sensormatic Electronics Corporation, Southern California Edison, and Telecommunications Industry Association., dated August 12, 1994.

[176] See e.g., Ex Parte Comments of MobileVision dated December 14, 1994, at 1-2.

[177] See paragraphs 26 and 27, supra.

size of the channel(s) being used.

i) Narrowband Communication Links

79. Narrowband communication links are used in certain multilateration systems to provide voice and data communications within the broadband portion of their allocation of spectrum. Additionally, the narrowband communication link differs from a wideband communication link in that it uses small (e.g., 25 kHz) channels to accomplish its messaging functions. These narrowband transmissions are a valuable asset and are may enhance the economic viability and flexibility of these particular multilateration systems.[178] However, as we did for reverse links in order to limit their interference potential, we will also limit the maximum power of narrowband communication links to 30 watts ERP. This limitation encompasses communication links that originate at fixed/base stations as well as mobiles. Due to the fact that these transmissions should only occur sporadically or in the event of an emergency, we believe that this power level should serve to limit interference to Part 15 operations. However, we note that multilateration licenses are conditioned on additional testing as discussed in paragraphs 81-82.

ii) Wideband Communication Links

80. Certain multilateration systems use wideband communication links, integrated with accompanying wideband forward links, to provide messaging within the broadband segment. This wideband link differs from narrowband communication links because it transmits a direct sequence spread spectrum signal across the entire sub-band (e.g. all of the 904.000-909.750 MHz sub-band) instead of signals on small channels within the sub-band. Although these links are perceived to represent greater interference potential to Part 15 devices,[179] we conclude that these wideband links should be authorized. As noted earlier, however, multilateration system licenses are conditioned on additional testing as discussed in paragraphs 81-82.

Testing of Multilateration Systems

81. In comments, a number of parties to this proceeding have expressed the desire and need for additional testing to demonstrate the feasibility of multiple services coexisting in the 902-928 MHz band, in particular the multilateration LMS users and the operators of Part 15 devices. Our record contains a significant amount of information on the issue of mutual coexistence between these parties, which was submitted in the form of theoretical analyses, demonstrations and testing (See Appendix B). This record shows that certain aspects and elements of these various systems and services create a greater potential for interference than

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[178] See Ex Parte Comments of Mobilevision dated December 14, 1994, at 5.

[179] See e.g., Ex Parte Comments of Cellnet and KNOGO dated August 19, 1994, at 4.

others.[180] The band plan adopted in this item was crafted on the basis of this extensive record. In addition, these submissions were used to establish technical limitations or criteria on the operations of the various systems, to minimize the potential for interference and provide a more conducive environment for sharing of the band by the disparate services.

82. The record of this proceeding contains substantial technical analysis supporting the band plan we now adopt. We are persuaded, however, that additional testing could provide users of the band with data that could contribute to "fine-tuning" system operations. Therefore, to ensure that the coexistence of the various services in the band is as successful as possible and to identify whether further refinements in our rules are necessary, we will condition grant of each MTA multilateration license on the licensee's ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to Part 15 devices. To provide such protection and to facilitate band sharing and minimize interference to Part 15 operations, multilateration licensees may employ any one of a number of technical refinements, i.e., limiting duty cycle, pulse duration power, etc. It is our expectation that such testing be accomplished through close cooperation between multilateration systems users and operators of Part 15 systems.

L. LMS Below 512 MHz

83. In the Notice, we proposed that the expanded definition of LMS would apply to below 512 MHz systems, but that licensees of such systems would not be permitted to provide service to individuals or to provide service on a private carrier basis. NABER is the only commenter that addressed LMS operation below 512 MHz. NABER requests clarification of several points pertaining to these systems, including coordination requirements and co-channel separation requirements between LMS systems and non-LMS systems used for voice operations.[181] NABER also notes that proposed Section 90.105(b)(3)(i) discusses loading criteria for systems operating with single frequencies, two-frequency mode, and pairs of frequencies, but that Section 90.105(b)(3)(ii) only discusses separation criteria for operations using single frequencies or two frequencies. NABER suggests that because the loading criteria are the same, we apply the same separation criteria for single frequency operations to operations using pairs of frequencies.

84. Section 90.175 of our Rules provides that applicants for frequencies below 512 MHz must generally obtain a frequency recommendation from a frequency coordinator. We

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[180] Many of these submissions have focused on concerns regarding the use of wideband forward links for multilateration systems, the location of such links in the band, and the appropriate power levels for both forward and reverse link transmissions.

[181] NABER comments. NABER also requests clarification as to the effect our "Refarming" proceeding (PR Docket 92-235, Notice of Proposed Rule Making, 7 FCC Rcd 8105 (1992) will have on LMS systems. No final action has yet been taken in the Refarming proceeding. Ultimately, LMS systems below 512 MHz will have to adhere to any decisions reached in that proceeding.

conclude that LMS applicants should be subject to these same coordination requirements when applying for these frequencies. Accordingly, applicants for LMS systems below 512 MHz must meet the coordination requirement of Section 90.175(a) of our Rules, 47 C.F.R. § 90.175(a). Applicants will use the frequency coordinator for the radio service in which they have established their eligibility. We will also require LMS systems authorized below 512 MHz to modify their licenses under the same conditions as other land mobile licensees. This means that a modification application will have to be filed for changes in the number of base, fixed, control, or mobile transmitters.[182]

85. Section 90.105(b)(3)(i) only discusses using pairs of frequencies in the 470-512 MHz band. Because these frequencies are only available within 80 km (50 miles) of 13 major urban areas, applying a 120 km (75 miles) separation between non-LMS voice systems and LMS systems would severely restrict LMS use of this spectrum. Pairs of frequencies in the 470-512 MHZ band will be assigned in accordance with the allocation plan for the band as described in Subpart L, 47 C.F.R. Part 90, Subpart L, except that the 200 mobile unit loading criteria will apply and an LMS system will not be authorized to share a channel utilized by a non-LMS licensee operating a voice system unless an agreement with the licensee is reached. Accordingly, the co-channel separation between LMS systems and co-channel non-LMS voice systems in the 470-512 MHz band will be 64 km (40 miles), except on Channel 15 in Chicago, Channel 20 in Philadelphia, and Channel 17 in Washington where the minimum co-channel separation is 32 km (20 miles). See 47 C.F.R. § 90.313.

86. We also adopt our proposal to extend the definition of LMS to below-512 MHz systems. We are not, however, expanding uses of LMS systems below 512 MHz to provide service to individuals or to provide service on a commercial basis. Such commercial uses of LMS would be inconsistent with the nature of the spectrum below 512 MHz, which is intended primarily for the use of private land mobile radio (PLMR) communications to enable private land mobile eligibles to provide for their own internal communications needs. Moreover, the frequency bands below 512 MHz on which LMS systems are licensed are shared PLMR frequencies. Many of these channels are already unacceptably crowded. We are currently considering rule changes to increase channel capacity and promote more efficient use of PLMS frequencies below 512 MHz.[183] Permitting LMS systems authorized below 512 MHz to provide service on a commercial basis, or to provide service to individuals, would only exacerbate this spectrum congestion.

M. Technical Issues

87. In the Notice, we proposed a number of technical requirements for LMS systems to minimize the possibility of both co-channel and adjacent-channel interference and we proposed that equipment be type accepted to ensure compliance with these standards. The

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[182] See 47 C.F.R. § 90.135(a).

[183] See Notice of Proposed Rule Making, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992).

following technical criteria will be applied to licensees of LMS systems. Our proposals, commenters' responses, and our decisions are discussed below.

88. Type Acceptance. We proposed that LMS equipment be required to be type accepted.[184] This proposal was supported by Teletrac, MobileVision, SBMS, Mark IV, and Location Services.[185] Teletrac proposes that we require the equipment to be authorized through the notification process one-year from the adoption date of this Report and Order, while SBMS suggests type acceptance after 18-months.[186] Location Services suggests that licensees be permitted to operate new equipment on a commercial basis for 18 months before such equipment must be type accepted.[187] We are adopting our proposal to require type acceptance. We decline to adopt Teletrac's proposal that we only require equipment "notification."[188] Considering the mobile nature of most LMS transmitters and that new, advanced technologies will be employed in this equipment, we find that the stricter regulatory oversight of having equipment type accepted rather than "notified" is justified. Accordingly, all LMS equipment imported or marketed after April 1, 1996, must be type accepted for use under Part 90 of our Rules, 47 C.F.R. Part 90. This includes the "transmitting tags" used in certain non-multilateration systems. If, however, these units meet the requirements of Part 15 of our Rules, 47 C.F.R. Part 15, they may be authorized under that Part. By delaying the requirement for type acceptance, we effectively adopt Location Services' proposal for a grace period in which to operate LMS equipment without authorization, albeit for a lesser period than 18 months. As discussed in the Notice,[189] licensees still in the developmental stages that do not wish to seek type acceptance may be licensed on a developmental basis in accordance with Subpart Q of Part 90.[190]

89. Emissions. We proposed that no restriction be placed on the type of emission that may be authorized for LMS operation in the 902-928 MHz band.[191] MobileVision and

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[184] Notice at para. 29, 8 FCC Rcd 2502, 2507 (1993).

[185] Teletrac comments at 48; MobileVision comments at 50; SBMS comments 23; Mark IV comments at 13; and Location Services comments at 3.

[186] Teletrac comments at 48; SBMS comments at 23.

[187] Location Services comments at 3.

[188] Teletrac comments at 48.

[189] Notice at para. 29, 8 FCC Rcd. 2502, 2507 (1993).

[190] 47 C.F.R. Part 90 Subpart Q.

[191] Notice at para. 30, 8 FCC Rcd 2502, 2507 (1993). See Section 2.201 of the Rules, 47 C.F.R. § 2.201, for a description of emission designators.

SBMS support this proposal.[192] Teletrac supports this proposal only if multilateration systems are required to be physically separated.[193] Teletrac claims that, in the absence of geographic separation, stricter limits on emissions are required to prevent interference between multilateration systems.[194] We are adopting our proposal to place no limits on the type of emission that can be authorized for LMS systems. Allowing any types of emissions will enable any type of location or monitoring technology or ancillary service to develop without restrictions. We will limit the likelihood of interference through appropriate power, frequency tolerance and emission mask limitations. Moreover, exclusive licensing of multilateration systems in MTAs in each of the three respective sub-bands should ameliorate concerns of co-channel multilateration LMS interference.

90. Bandwidth. We proposed to limit the bandwidth of LMS systems as follows:

for 904-912 and 918-926 MHz -- maximum 8 MHz
for 902-904 and 926-928 MHz -- maximum 2 MHz
for 912-918 MHz -- maximum 6 MHz[195]

MobileVision supports the maximum bandwidths proposed while Pinpoint opposes limiting the maximum permissible bandwidth within the 902-928 MHz band.[196] In conformance with the band plan we have adopted, we are adopting maximum permissible bandwidths as follows:

For Multilateration systems:

for 904.000-909.750 MHz -- maximum 5.750 MHz
for 919.750-921.750 MHz -- maximum 2.000 MHz
for 921.750-927.500 MHz -- maximum 5.750 MHz[197]
for 919.750-927.750 MHz -- maximum 8.000 MHz[198]

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[192] MobileVision comments at 50; SBMS comments at 24.

[193] Teletrac comments at 49.

[194] Id.

[195] Notice at para. 30, 8 FCC Rcd. 2502, 2507 (1993).

[196] MobileVision Comments at 49; Pinpoint Comments at 23-26.

[197] This includes 5.5 MHz multilateration bandwidth and adjoining, associated 0.25 MHz forward link.

[198] This bandwidth capability only exists for licensees aggregating the adjacent 2 MHz and 5.5 MHz multilateration bands and includes the adjoining, associated forward link bands.

For Narrow Band Links:

for 927.250-927.500 MHz -- maximum 250 kHz
for 927.500-927.750 MHz -- maximum 250 kHz
for 927.750-928.000 MHz -- maximum 250 kHz

For Non-multilateration systems:

for 902.000-904.000 MHz -- maximum 2.000 MHz
for 909.750-921.750 MHz -- maximum 12.000 MHz

While we establish these maximum permissible bandwidths, applicants for non-multilateration LMS systems should request only the minimum amount of bandwidth necessary to meet their operational needs.

91. Frequency Tolerance. We proposed a frequency tolerance for transmitters in the 904-912 and 918-926 MHz bands of 0.0005 percent and proposed that no minimum frequency tolerance be established for transmitters in the 902-904, 912-918, and 926-928 MHz bands.[199] The frequency tolerance for these systems would be specified on the station's authorization. MobileVision, SBMS, Mark IV, and Hughes support the proposed frequency tolerance of 0.0005 percent for multilateration systems and support having no specific frequency tolerance for non-multilateration systems.[200] Teletrac argues that tighter frequency tolerances are required and recommends a tolerance of 0.00025 percent for both multilateration and non-multilateration systems.[201] We agree with Teletrac that tighter frequency tolerances are justified to help reduce the potential for interference to systems operating on adjacent frequencies and that this argument extends to non-multilateration as well as multilateration systems. Additionally, as Teletrac points out, the frequency tolerance it has proposed is more liberal than that required for other services in the 900 MHz band. Accordingly, we are adopting a frequency tolerance of 0.00025 percent for both multilateration and non-multilateration systems.

92. Effective Radiated Power. We proposed a maximum peak effective radiated power (ERP) for any LMS systems operating in the 902-928 MHz band of 300 watts.[202]

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[199] Notice at para. 30, 8 FCC Rcd. 2502, 2507 (1993).

[200] MobileVision comments at 49; SBMS comments at 24; Mark IV comments at 13; Hughes comments at 13.

[201] Teletrac comments at 49.

[202] Notice at para. 30, 8 FCC Rcd 2502, 2507 (1993). The current maximum power for multilateration systems is 1 kW peak envelope power (PEP) transmitter output power. See existing 47 C.F.R. § 90.239(e)(2)(i).

SBMS supports our proposed 300 watt peak ERP.[203] MobileVision opposes any reduction in permissible power. AT&T and Hughes support a 30 watt ERP power limit for non-multilateration systems with 10 meter and 15 meter antenna height restrictions respectively.[204] Amtech and Pinpoint support various power limits for different systems based a shared use of the entire band.[205] Mark IV supports a field strength limit of 1 mV/m at 3000 meters with a maximum antenna height of 10 meters for non-multilateration systems rather than a limit on peak ERP.[206]

93. As discussed earlier,[207] we will limit the maximum ERP of multilateration LMS system narrowband forward links, which operate between 927.250-928.000 MHz, to 300 watts. However, we will limit maximum power for transmissions of multilateration system base and mobile stations outside the 927.250-928.000 MHz sub-band to 30 watts maximum ERP. Limiting base and mobile stations' power levels will reduce the potential for interference between co-channel multilateration systems [208] and will reduce the likelihood of interference to any other operations in the 902-928 MHz band. In addition, we are limiting the peak ERP of non-multilateration systems to 30 watts and limiting the antenna height above ground of these systems to 15 meters. Reducing the maximum power and antenna height of non-multilateration systems will allow non-multilateration systems to share spectrum more easily with other non-multilateration systems and with users of Part 15 devices and will permit greater frequency reuse for these systems.

94. Currently, facilities authorized in the private radio services are categorically excluded from our rules requiring an environmental assessment to demonstrate that a facility complies with standards concerning human exposure to radiofrequency radiation. (See Second Report and Order, in Gen. Docket No. 79-144, 2 FCC Rcd 2064 (1987); and Erratum, 2 FCC Rcd 2526 (1987). The guidelines used for evaluating the environmental effects of radiofrequency radiation, however, are currently under review in ET Docket No. 93-62 (See Notice of Proposed Rule Making, ET Docket No. 93-62, 8 FCC Rcd. No. 93-62 (1993)). In that proceeding we note that some of the current categorical exclusions may be inconsistent with the new guidelines being considered. We wish to emphasize here that LMS systems will be required to comply with any requirements adopted in ET Docket No. 93-62.

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[203] SBMS comments at 24.

[204] AT&T comments at 7-8; Hughes comments at 7-9.

[205] Amtech comments at 33-35; Pinpoint comments at 31-34.

[206] Mark IV comments at 13.

[207] See discussion of Forward Links, paragraphs 73-76.

[208] We contemplate that this issue will have significance in MTAs where exclusive LMS licensees must co-exist with grandfathered LMS licensees.

95. Interference Criteria for Co-Channel Multilateration Licensees. Exclusive MTA multilateration LMS licensees and co-channel grandfathered multilateration LMS licensees must not interfere with one another. Similarly, exclusive MTA multilateration LMS licensees must also ensure that they do not cause interference to exclusive co-channel MTA licensees in adjacent MTAs. To help reduce the likelihood for interference between adjacent MTA licensees, we will impose a 47 dBuV/m field strength limit at the MTA boundary on signals transmitted from the base stations of MTA licensees.[209] If differences arise over whether interference has been caused, we will expect the particular licensees to cooperate with one another to resolve these disputes. Should the Commission have to become involved in any disagreements among licensees, we may employ a wide variety of tools to resolve such disputes.[210] These tools could include, but are not limited to, requiring use of a common controller or mandating a particular time sharing arrangement. If, however, we determine that an LMS licensee has not cooperated in developing a suitable mechanism to minimize harmful interference, or that a licensee's system design renders it extraordinarily sensitive to interference, we may authorize the other licensee to operate its LMS system regardless of interference caused to the LMS system that failed to cooperate or that has a system design highly susceptible to interference.

96. Emission Mask. We proposed that emissions anywhere within a licensee's authorized bandwidth not be required to be attenuated but that any emissions outside of the authorized bandwidth be attenuated by at least 55 + 10log(P) dB where P is the highest emission (in watts) of the transmitter inside the authorized bandwidth.[211] This requirement applies to both multilateration and non-multilateration systems. We also requested comment on whether multilateration systems should be required to distribute power evenly throughout

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[209] We note that in adopting this 47 dBuV/m limit, we are not determining that this field strength will necessarily result in reliable service for all multilateration systems. It is merely a level that may not be exceeded by MTA licensees and is thus established for interference planning purposes only. (see Second Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 93-451, released October 22, 1993 at paragraph 177).

[210] Disputes over harmful interference (as described in Section 90.173(b) of our Rules) are typically resolved on a case-by-case basis. For these services, while absolute blocking of a licensee's transmissions throughout a large region would constitute the only clear-cut case of harmful interference (see Section 90.7 for definition of harmful interference under 47 C.F.R. Part 90), it is possible that lesser degrees of interference could diminish the accuracy or reliability of certain multilateration systems in a limited portion of a system's area of operation. The degree to which such lesser amounts of interference would be considered harmful cannot be determined in advance, and there can be no guarantee that licensees will be unconditionally protected from interference of this type. Because of these unique characteristics of multilateration systems, we decline to specify what will be considered to constitute harmful interference to such systems.

[211] Notice at para. 30, 8 FCC Rcd. 2507 (1993).

their authorized band.[212]

97. Mark IV IVHS was the only commenter that supports a requirement that power be evenly distributed across a licensee's authorized bandwidth. Both Mark IV IVHS and Teletrac believe that only emissions outside of the 902-928 MHz band (rather than any emissions outside of a licensee's authorized bandwidth) should be attenuated by 55 + 10log(P) dB. Mark IV IVHS would require that frequencies outside of the licensee's authorized bandwidth only be attenuated by 30 + 10log(P) dB, while Teletrac would just require that 99 percent of the power be within the licensee's authorized bandwidth. MobileVision would require that spurious spread spectrum emission should not exceed 100 + 10logP dBW/Hz and the level of any spurious discrete emission could not exceed 55 + 10logP dBW. SBMS would merely require that the first side-lobe be 20 dB below main lobe and each following side-lobe be progressively reduced by 10 dB out to the third lobe. Amtech and Pinpoint provide recommendations for various power, height and emissions limits for different systems and supports establishment of robustness and sharing requirements.

98. We will require licensees to attenuate their emissions by 55 + 10log(P) dB at the edges of the specified LMS subbands. The licensed frequency band edges for multilateration systems for which emissions must be attentuated are 904, 909.75, 919.75, 921.75, 927.50, 927.75 and 928 MHz. If the 919.75-921.75 and 921.75-927.25 MHz subbands are aggregated by a single licensee, the emission mask limitations at the band edges at 921.75 and 927.50 MHz may be ignored. The licensed frequency band edges for non-multilateration systems for which emissions must be attenuated are 902, 904, 909.75 and 921.75 MHz. These emission limitations will assure that multilateration and non-multilateration systems will not interfere with each other and that operations below 902 MHz and above 928 MHz are protected.

IV. CONCLUSION

99. Given the plethora of diverse users that share the 902-928 MHz band, this has been an especially difficult proceeding. While we strongly support and wish to encourage the continued development and deployment of an LMS industry, we also recognize the valuable services being provided by other users of this spectrum. We believe that the rules we have adopted herein fairly balance these diverse interests. While we have not been able to satisfy all of the concerns of all of the parties in this proceeding, we reviewed extensive comments and replies to the Notice as well as a very large number of ex parte filings in this docket and serious consideration was given to each position. Given the diverse and often mutually exclusive interests of the many parties that participated, our decisions were the best that could be achieved. The rules will allow for the continued growth of LMS services and

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[212] Id.

advance Congress' goal of developing an intelligent transportation system infrastructure. At the same time, we have attempted to ensure that other users of the band, including Amateur operators and users of Part 15 devices, will be able to co-exist with LMS.

100. We have taken the long-term beneficial action of creating the Transportation Infrastructure Radio Service. By creating this new service at this early date in ITS development, we will be able to take an organized approach to regulating spectrum and services related to ITS and transportation infrastructure in general.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

101. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need and Purpose of the Action

102. The rules adopted herein will enhance use of the 902-928 MHz band for location and monitoring systems. These rules replace the existing interim rules that govern automatic vehicle monitoring systems. The new rules create a more stable environment for LMS system licensees and provides much needed flexibility for operators of such systems.

Issues Raised in Response to the Initial Regulatory Flexibility Analysis

103. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered and Rejected

104. All significant alternatives are discussed in this Report and Order.

VI. PAPERWORK REDUCTION

105. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

VI. ORDERING CLAUSES

106. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 302, 303(r), and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(r), and 332(a), Parts 2 and 90 of the Commission's Rules, 47 C.F.R. Parts 2 and 90, ARE AMENDED as set forth in Appendix A below, effective [thirty days after publication in the Federal Register].

107. The Petition for Rule Making filed on January 13, 1994 by the American Radio Relay League IS DENIED.

108. For further information concerning this Report and Order, contact Thomas S. Dombrowsky, Martin D. Liebman or John J. Borkowski of the Wireless Telecommunications Bureau at (202) 418-0620.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

Parts 2 and 90 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106 is amended by adding "Private Land Mobile (90)" to the FCC use designators in the entry for 902-928 MHz in the table and by revising footnotes US218 and US275 to read as follows:

§ 2.106 Table of Frequency Allocations

* * * * *

International table	United States table		FCC use designators	
	Government	Non-Government	Rulepart(s)	Special-use frequencies
* * *				
	902-928 RADIOLOCATION	902-928	Private Land Mobile (90) Amateur (97)	915 ± 13 MHz Industrial, scientific, and medical frequency.
	707 US215 US218 US267 US275 G11 G59	707 US215 US218 US267 US275		
* * *				

* * * * *

US218 The band 902-928 MHz is available for Location and Monitoring Service (LMS) systems subject to not causing harmful interference to the operation of all Government stations authorized in these bands. These systems must tolerate interference from the

operation of industrial, scientific, and medical (ISM) devices and the operation of Government stations authorized in these bands.

* * * * *

US275 The band 902-928 MHz is allocated on a secondary basis to the amateur service subject to not causing harmful interference to the operations of Government stations authorized in this band or to Location and Monitoring Service (LMS) systems. Stations in the Amateur service must tolerate any interference from the operations of industrial, scientific, and medical (ISM) devices, LMS systems, and the operations of Government stations authorized in this band. Further, the Amateur Service is prohibited in those portions of Texas and New Mexico bounded on the south by latitude 31°41' North, on the east by longitude 104°11' West, and on the north by latitude 34°30' North, and on the west by longitude 107°30' West; in addition, outside this area but within 150 miles of these boundaries of White Sands Missile Range the service is restricted to a maximum transmitter peak envelope power output of 50 watts.

* * * * *

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.7 is amended by removing the entry for Automatic Vehicle Monitoring and adding new definitions for Basic Trading Areas, Forward Links, Location and Monitoring Service (LMS), Major Trading Areas, Multilateration LMS System, and Non-multilateration LMS System in alphabetical order to read as follows:

§ 90.7 Definitions.

* * * * *

Basic Trading Areas. Service areas that are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas,

Rincon, Sabana Grande, Salinas, San German, Santa Isabel, Villalba, and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

* * * * *

Forward Links. Transmissions in the frequency bands specified in § 90.357(a) and used to control and interrogate the mobile units to be located by multilateration LMS systems.

* * * * *

Location and Monitoring Service (LMS). The use of non-voice signaling methods to locate or monitor mobile radio units. LMS systems may transmit and receive voice and non-voice status and instructional information related to such units.

* * * * *

Major Trading Areas. Service areas based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, with the following exceptions and additions:

(a) Alaska is separated from the Seattle MTA and is licensed separately.

(b) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.

(c) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.

(d) American Samoa is licensed as a single MTA-like area.

* * * * *

Multilateration LMS System. A system that is designed to locate vehicles or other objects by measuring the difference of time of arrival, or difference in phase, of signals transmitted from a unit to a number of fixed points or from a number of fixed points to the unit to be located.

* * * * *

Non-multilateration LMS System. A system that employs any of a number of non-multilateration technologies to transmit information to and/or from vehicular units.

* * * * *

3. Section 90.101 is revised to read as follows:

§ 90.101 Scope.

The Radiolocation Service accommodates the use of radio methods for determination of direction, distance, speed, or position for purposes other than navigation. Rules as to eligibility for licensing, permissible communications, frequency available, and any special requirements are set forth in the following section. Provisions for the Location and Montoring Service (LMS) are contained in Subpart M of this Part.

4. Section 90.103 is amended by removing paragraph (d) and by redesignating existing paragraph (e) as paragraph (d).

5. Section 90.155 is amended by revising paragraph (a) and adding new paragraphs (d) and (e) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraphs (b) and (d) of this section and in §§ 90.629 and 90.631(f), must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

* * * * *

(d) Multilateration LMS systems authorized in accordance with § 90.353 must be constructed and placed in operation within twelve (12) months from the date of grant or the authorization cancels automatically and must be returned to the Commission. MTA-licensed multilateration LMS systems will be considered constructed and placed in operation if such systems construct a sufficient number of base stations that utilize multilateration technology (see paragraph (e) of this Section) to provide multilateration location service to a substantial portion of at least one BTA in the MTA.

(e) A multilateration LMS station will be considered constructed and placed in operation if it is built in accordance with its authorized parameters and is regularly interacting with one or more other stations to provide location service, using multilateration technology, to one or more mobile units. Specifically, LMS multilateration stations will only be considered constructed and placed in operation if they are part of a system that can interrogate a mobile, receive the response at 3 or more sites, compute the location from the time of arrival of the responses and transmit the location either back to the mobile or to a subscriber's fixed site.

6. Section 90.179 is amended by revising paragraph (g) to read as follows:

§ 90.179 Shared use of radio stations.

* * * * *

(g) Above 800 MHz, shared use on a for-profit private carrier basis is permitted only by SMR, Private Carrier Paging, and LMS licensees. See Subparts M, P, and S of this Part.

7. Section 90.203 is amended by adding new paragraph (b)(7) to read as follows:

§ 90.203 Type acceptance required.

* * * * *

(b) * * *

(7) Transmitters imported and marketed prior to April 1, 1996 for use by LMS systems.

* * * * *

8. Section 90.205(b) is amended by adding the 902-927.25 and 927.25-928 MHz bands to the table in numerical order and by adding footnote (13) to read as follows:

§ 90.205 Power.

* * * * *

(b) * * *

Frequency range (megahertz)	Maximum Output power (watts)	Maximum effective radiated power (watts)
* * * * *		
902-927.25	.....	30 ([13])
927.25-928	.....	300
* * * * *		

13 Effective radiated power shall be measured as peak envelope power.

* * * * *

9. Paragraph (g) of Section 90.207 is removed and reserved.

10. Section 90.209 is amended by adding new paragraphs (b)(10) and (m) to read as follows:

§ 90.209 Bandwidth limitations.

* * * * *

(b) * * *

(10) The maximum authorized bandwidth shall be 12 MHz for non-multilateration LMS operations in the band 909.75-921.75 MHz and 2 MHz in the band 902.00-904.00 MHz. The maximum authorized bandwidth for multilateration LMS operations shall be 5.75 MHz in the 904.00-909.75 MHz band; 2 MHz in the 919.75-921.75 MHz band; 5.75 MHz in the 921.75-927.25 MHz band and its associated 927.25-927.50 MHz narrowband forward link; and 8.00 MHz if the 919.75-921.75 MHz and 921.75-927.25 MHz bands and their associated 927.25-927.50 MHz and 927.50-927.75 MHz narrowband forward links are aggregated.

* * * * *

(m) For transmitters authorized under Subpart M that operate in the 902-928 MHz band, the peak power of any emission shall be attenuated below the power of the highest emission contained within the licensee's LMS sub-band in accordance with the following schedule:

(1) On any frequency within the authorized bandwidth: Zero dB.

(2) On any frequency outside the licensee's LMS sub-band edges (as identified in paragraph (m)(5) of this section): $55 + 10 \log(P)$ dB where (P) is the highest emission (watts) of the transmitter inside the licensee's LMS sub-band.

(3) The resolution bandwidth of the instrumentation used to measure the emission power shall be 100 kHz. If a video filter is used, its bandwidth shall not be less than the resolution bandwidth.

(4) Emission power (P) shall be measured in peak values.

(5) The LMS sub-band edges for multilateration systems for which emissions must be attenuated are 904.00, 909.75, 919.75, 921.75, 927.50, 927.75 and 928.00 MHz. If the 919.75-921.75 and 921.75-927.25 MHz sub-bands are aggregated by a single licensee, the emission mask limitations at the band edges at 921.75 and 927.50 MHz may be ignored. The LMS sub-band edges for non-multilateration systems for which emissions must be attenuated are 902.00, 904.00, 909.75 and 921.75 MHz.

11. Section 90.213 is amended by adding the 902-928 MHz band to the table in numerical order in paragraph (a) to read as follows:

§ 90.213 Frequency tolerance.

(a) * * *

Frequency Tolerance

Frequency range	Fixed and base stations		Mobile stations	
	Over 200W output power	200 w or less output power	Over 2W output power	2W or less output power
		* * * * *		
902-928	.00025	.00025	.00025	.00025
		* * * * *		

12. Section 90.239 is removed and reserved.

13. Subpart M is added to Part 90 to read as follows:

Subpart M -- Transportation Infrastructure Radio Service

§ 90.350 Scope.
§ 90.351 Location and Monitoring Service.
§ 90.353 LMS operations in the 902 - 928 MHz band.
§ 90.355 LMS operations below 512 MHz.
§ 90.357 Frequencies for LMS systems in the 902 - 928 MHz band.
§ 90.359 Field strength limits for MTA-licensed LMS systems.
§ 90.361 Interference from Part 15 and Amateur operations.
§ 90.363 Grandfathering provisions for existing AVM Licensees.

§ 90.350 Scope.

The Transportation Infrastructure Radio Service is for the purpose of integrating radio-based technologies into the nation's transportation infrastructure and to develop and implement the nation's intelligent transportation systems. It includes the Location and Monitoring Service (LMS). Rules as to eligibility for licensing, frequencies available, and any special requirements for services in the Transportation Infrastructure Radio Service are set forth in this Subpart.

§ 90.351 Location and Monitoring Service.

These provisions authorize the licensing of systems in the Location and Monitoring Service (LMS). LMS systems utilize non-voice radio techniques to determine the location and status of mobile radio units. LMS licensees authorized to operate a system in the 902-928 MHz band may serve individuals, federal government agencies, and entities eligible for licensing in Part 90.

(a) Each application to license an LMS system shall include the following supplemental information:

(1) A detailed description of the manner in which the system will operate, including a map or diagram.

(2) The necessary or occupied bandwidth of emission, whichever is greater.

(3) The data transmission characteristics as follows:

(i) The vehicle location update rates;

(ii) Specific transmitter modulation techniques used;

(iii) For codes and timing scheme: A table of bit sequences and their alphanumeric or indicator equivalents, and a statement of bit rise time, bit transmission rates, bit duration, and interval between bits;

(iv) A statement of amplitude-versus-time of the interrogation and reply formats, and an example of a typical message transmission and any synchronizing pulses utilized.

(4) A plan to show the implementation schedule during the initial license term.

(b) LMS stations are exempted from the identification requirements of § 90.425; however, the Commission may impose automatic station identification requirements when determined to be necessary for monitoring and enforcement purposes.

§ 90.353 LMS operations in the 902 - 928 MHz band.

LMS systems may be authorized within the 902-928 MHz band, subject to the following conditions. LMS licensees are required to maintain whatever records are necessary to demonstrate compliance with these provisions and must make these records available to the Commission upon request:

(a) LMS operations will not cause interference to and must tolerate interference from industrial, scientific, and medical (ISM) devices and radiolocation Government stations that operate in the 902 - 928 MHz band.

(b) LMS systems are authorized to transmit status and instructional messages, either voice or non-voice, so long as they are related to the location or monitoring functions of the system.

(c) LMS systems may utilize store and forward interconnection, where either (1) transmissions from a vehicle or object being monitored are stored by the LMS provider for later transmission over the public switched network (PSN), or (2) transmissions received by the LMS provider from the PSN are stored for later transmission to the vehicle or object being monitored. Real-time interconnection between vehicles or objects being monitored and the PSN will only be permitted to enable emergency communications related to a vehicle or a passenger in a vehicle. Such real-time, interconnected communications may only be sent to or received from a system dispatch point or entities eligible in the Public Safety or Special Emergency Radio Services. See Subparts B and C of this Part.

(d) Multilateration LMS systems will be authorized on a primary basis within the bands 904-909.75 MHz and 921.75-927.25 MHz. Additionally, multilateration and non-multilateration systems will share the 919.75-921.75 MHz band on a co-equal basis. Licensing will be on the basis of Major Trading Area (MTA) service areas for multilateration systems, with one exclusive MTA license being issued for each of these three sub-bands. Except as provided in paragraph (f) of this Section, multilateration MTA licensees may be authorized to operate on only one of the three multilateration bands within a given MTA. Additionally, MTA multilateration LMS licenses will be conditioned upon the licensee's ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to Part 15 devices.

(e) Multilateration MTA-licensed systems and grandfathered AVM systems (see Section 90.363) are authorized on a shared basis and must cooperate in the selection and use of frequencies in accordance with Section 90.173(b).

(f) Multilateration MTA licensees may be authorized to operate on both the 919.75-921.75 MHz and 921.75-927.25 MHz bands within a given MTA (see Section 90.209(b)(10)).

(g) Multilateration LMS systems whose primary operations involve the provision of vehicle location services, may provide non-vehicular location services.

(h) Non-multilateration stations are authorized to operate on a shared, non-exclusive basis in the 902-904 MHz and 909.75-921.75 MHz sub-bands. Non-multilateration systems and multilateration systems will share the 919.75-921.75 MHz band on a co-equal basis. Non-multilateration LMS systems may not provide non-vehicular location services.

The maximum antenna height above ground for non-multilateration LMS systems is 15 meters.

§ 90.355 LMS operations below 512 MHz.

Applicants requiring not more than 25 kHz bandwidth per frequency in the 25-50 MHz, 150-170 MHz, and 450-512 MHz bands may use either base-mobile frequencies currently assigned the applicant, or be assigned base-mobile frequencies available in the service in which eligibility has been established, provided that:

(a) For transmission between vehicles and base stations, each frequency in a single-frequency mode of operation will provide location data for approximately 200 vehicles, or both frequencies in a two-frequency mode of operation will provide location data for approximately 400 vehicles, except that for frequencies in the 450-512 MHz band that are assigned in pairs in accordance with the allocation plan for the band, the requirement is that location data be provided for approximately 200 vehicles for each frequency pair; and a showing is made that 50 percent of the vehicles will be in operation within the system by the end of the second year of the initial license term, and 70 percent will be in operation within the system by the end of the initial license term; except that if these vehicle loading standards will not be met, frequencies will be assigned only on a secondary non-interference basis to any authorized radiotelephony operation.

(b) The minimum separation between a proposed LMS station and the nearest co-channel base station of another licensee operating a voice system is 75 miles (120 km) for a single frequency mode of operation or 35 miles (56 km) for a two-frequency mode of operation. Where the minimum mileage separation cannot be achieved, agreement to the use of F1D, F2D, G1D, G2D or P0N emission must be received from all existing co-channel licensees using voice emissions within the applicable mileage limits. If there is interference with voice operations and required agreement was not received, or operation was authorized on a secondary non-interference basis, the licensee of the LMS system is responsible for eliminating the interference.

(c) Frequencies additional to any assigned under paragraph (a) of this section will not be assigned to the same licensee at any stations located within 64 km (40 miles) of any station in which the licensee holds an interest until each of such licensee's frequencies for LMS operation is shown to accommodate not less than 90 percent of the frequency loading requirements specified in paragraph (a) of this section.

§ 90.357 Frequencies for LMS systems in the 902 - 928 MHz band.

(a) Multilateration LMS systems will be authorized on the following LMS sub-bands:

LMS Sub-band	Forward Link([1])
904.000-909.750 MHz	927.750-928.000 MHz
919.750-921.750 MHz ([2])	927.500-927.750 MHz
921.750-927.250 MHz	927.250-927.500 MHz

1 Forward links for LMS systems may also be contained within the LMS sub-band. However, the maximum alllowable power in these sub-bands is 30 watts ERP in accordance with Section 90.205(b).

2 The frequency band 919.750-921.750 MHz is shared co-equally between multilateration and non-multilateration LMS systems.

(b) Non-multilateration LMS systems will be authorized on the following frequency bands:

LMS Sub-band [1]
902.000-904.000 MHz
909.750-921.750 MHz

1 Applicants for non-multilateration LMS systems should request only the minimum amount of bandwidth necessary to meet their operational needs.

§ 90.359 Field strength limits for MTA-licensed LMS systems.

MTA-licensed multilateration systems shall limit the field strength of signals transmitted from their base stations to 47 dBuV/m at their MTA boundary.

§ 90.361 Interference from Part 15 and Amateur operations.

Operations authorized under Parts 15 and 97 of this Chapter may not cause harmful interference to LMS systems in the 902-928 MHz band. These operations will not be considered to be causing harmful interference to a multilateration LMS system operating in one of the three MTA sub-bands (see Section 90.357(a)) if they operate in accordance with the provisions of 47 CFR Parts 15 or 97 and at least one of the following conditions are met:

(a) It is a field disturbance sensor operating under Section 15.245 of this Chapter and it is not operating in the 904-909.750 or 919.750-928.000 MHz sub-bands; or

(b) It does not employ an outdoor antenna; or

(c) If it does employ an outdoor antenna, then if

(1) The directional gain of the antenna does not exceed 6 dBi, or if the directional gain of the antenna exceeds 6 dBi, it reduces its transmitter output power below 1 watt by the proportional amount that the directional gain of the antenna exceeds 6 dBi; and

(2) Either

(i) The antenna is 5 meters or less in height above ground; or

(ii) The antenna is more than 5 meters in height above ground but less than or equal to 15 meters in height above ground and either:

(A) Adjusts its transmitter output power below 1 watt by 20 log (h/5) dB, where h is the height above ground of the antenna in meters; or

(B) Is providing the final link for communications of entities eligible under Subparts B or C of Part 90.

§ 90.363 Grandfathering provisions for existing AVM Licensees.

(a) These provisions authorize grandfathered operation by automatic vehicle monitoring (AVM) systems licensed on or before February 3, 1995. To attain grandfathered status for their stations, existing multilateration AVM licensees must file, on or before **[insert date 60 days after publication in the Federal Register]**, applications to modify their station licenses to comply with the band plan shown in Section 90.357(a). These applications to modify must identify the multilateration sub-band or sub-bands in which the applicants intend to operate their LMS system stations, once their applications to modify have been authorized. The application to modify a license to comply with the band plan shown in Section 90.357(a) may also include a modification to specify an alternate site, so long as the alternate site is 2 kilometers or less from the site specified in the original license.

(b) When existing multilateration AVM licensees file applications to modify, as specified in paragraph (a), they must certify that either:

(1) The stations that compose their AVM system were constructed and placed in operation in accordance with Section 90.155(e) on or before February 3, 1995 or

(2) The stations were not constructed and placed in operation in accordance with Section 90.155(e) on or before February 3, 1995.

(c) Multilateration AVM systems that were constructed and placed in operation on or before February 3, 1995 will be given until April 1, 1998 to convert to the spectrum identified in their LMS system license. Such licensees may continue to operate their systems during this period. Licensees of multilateration AVM constructed and operational systems that do not file applications to modify on or before **[insert date 60 days after publication in the Federal Register]**, will be permitted to continue operations under the provisions of former Section 90.239 until April 1, 1998 or the end of their original license term, whichever occurs first, at which time such licenses will cancel automatically and will not be renewed.

(d) Multilateration AVM licensees for stations that were not constructed and placed in operation on or before February 3, 1995 must construct their LMS systems and place them in operation on the spectrum identified in their LMS system license on or before April 1, 1996, or their licenses will cancel automatically (see Section 90.155(e)). Also, these licenses will cancel automatically on **[insert date 60 days after publication in the Federal Register]** unless timely modification applications are filed on or before this date (see paragraph (a)).

(e) Non-multilateration systems licensed in spectrum other than the 902.00-904.00 and 909.75-921.75 MHz bands must modify their licenses by April 1, 1998 to specify operation solely in the bands provided in Section 90.357(b) for non-multilateration systems and to operate their systems consistently with the provisions of Section 90.353.

Appendix B

List of Technical Studies, Tests and Analyses (included in the record in PR Docket 93-61)

June 25, 1993	Theoretical and Field Performance of Radiolocation Systems Pactel Teletrac filed on June 29, 1993
June 28, 1993	Engineering Analysis of Cochannel Pulse-Ranging LMS Systems Professor Raymond Pickholtz, filed by Teletrac on June 29, 1993
June 29, 1993	The relationship between Position-fixing rate & Occupied Bandwidth in AVL Systems Louis H. M. Jandrell, Pinpoint
July 29, 1993	Response to Comments filed in PR Docket 93-61 Louis H. M. Jandrell, Pinpoint
January 14, 1994	Capacity and Interference Resistance of Spread-Spectrum Automatic Vehicle Monitoring Systems in the 902 - 928 MHz ISM Band Interim Report Mobile Portable Radio Research Group of the Bradley Dept of Electrical Engineering at Virginia Tech, filed by Southwestern Bell Feb. 1, 1994
January 20, 1994	Review and Discussion of the Pinpoint ARRAY™ Network and Its Performance Hatfield Associates, Inc., filed by Pinpoint
March 15, 1994	Time Division Considerations for Wideband LMS Systems
	Technical Review of the Virginia Tech Interim Report "Capacity and Interference Resistance of Spread Spectrum Automatic Vehicle Monitoring Systems in the 902 - 928 MHz Band"
	Technical Review of Hatfield Associates' "Review and Discussion of the Pinpoint ARRAY Network and Its Performance" Graham Smith, MobileVision
May 10, 1994	Report on the Viability of Location Monitoring Services Technology Within the IVHS Industry MobileVision
June 21, 1994	Experience with Part 15 Interference AirTouch Teletrac

June 22, 1994	Further Analysis of Interference of Part 15 Devices and LMS Wideband Systems Probability of Interference Graham Smith, MobileVision filed on June 22, 1994
June 23, 1994	LMS Consensus Position on Part 15 Interference Filed by Teletrac, MobileVision, Pinpoint and Uniplex on June 23, 1994
August 2, 1994	Comments on MobileVision's "Further Analysis of Interference of Part 15 Devices and LMS Wideband Systems Probability of Interference" Dr. Jay E. Padgett, Chairman, TIA Consumer Radio Section, filed by Part 15 Coalition on August 12, 1994
August 8, 1994	Wide Area Pulse-Ranging AVM/LMS: Messaging/Locating System Design Tradeoffs and Part 15 Interference Dr. Jay E. Padgett, Chairman, TIA Consumer Radio Section, filed by Part 15 Coalition on August 12, 1994
September 15, 1994	Letter to William F. Caton concerning "Wide Area Pulse-Ranging AVM/LMS: Messaging/Locating System Design Tradeoffs and Part 15 Interference" by Louis H. M . Jandrell, Pinpoint
October 14, 1994	Capacity and Interference Resistance of Spread-Spectrum Automatic Vehicle Monitoring Systems in the 902 - 928 MHz ISM Band Final Report, Mobile and Portable Radio Research Group of the Bradley Department of Electrical Engineering, Virginia Tech Filed by Southwestern Bell on October 19, 1994
November 30, 1994	Response to Pinpoint's Comments on "Wide Area Pulse-Ranging AVM/LMS: Messaging/Locating System Design Tradeoffs and Part 15 Interference" Dr. Jay E. Padgett, Chairman, TIA Consumer Radio Section
December 7, 1994	On the Effect of Bandwidth on the Performance of AVM Systems Operating in the 902 - 928 MHz ISM Band Costas N. Georghiades Electrical Engineering Dept, Texas A&M University Filed by Pinpoint
December 13, 1994	Desensitization Calculations for Part 15 Devices and Wideband LMS Graham Smith, MobileVision

CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: Automatic Vehicle Monitoring

I am concurring in the issuance of this Report and Order only because it appears to constitute the best of three not very good alternatives.

In practical terms, the Commission must do one of the following: acknowledge that AVM systems have been designed and built in reliance on operating in the 902-928 MHz band and do the best we can to accommodate them; acknowledge that AVM systems' operating in this band is liable to cause a variety of interference problems, and thus move at least some of them out of the band; or force the mutually-interfering AVM and Part 15 users into some type of negotiated rulemaking and conduct some systematized field testing during the pendency of the negotiation process. The Report and Order does the first.

I would not vote for this Report and Order if either of the other two alternatives appeared likely to produce a better result. But in my judgment neither one does. While moving the most interference-prone AVM systems to another frequency band would perhaps be the best result if the Commission were writing on a clean slate, unfortunately, we are not. During the pendency of these proceedings AVM systems have been engineered in reliance on interim rules predicated on continued operation in the 902-928 MHz band. I would feel less compelled by this element of detrimental reliance had it not lasted as long as it has, and had a number of AVM licenses not been conferred in the interim. But it has, and under these circumstances to completely disrupt existing and planned AVM operations by reassigning them to different frequency bands strikes me as inequitable at best.

Nor does further testing and a forced negotiated rulemaking look promising to me. Although I would not characterize the testing that has been done to date as anything more than fragmentary and inconclusive, I am not certain that a more rigorous system of testing would tell us more than we already know: that interference to and from Part 15 devices and AVM systems is likely to be sporadic, unpredictable and, beyond a certain point, intractable. And the Report and Order's attempt to prescribe that AVM systems "adequately protect" the six to eight million Part 15 devices already operating in this band is not very reassuring. The sheer number and diversity of the Part 15 devices that already operate in this band virtually guarantees that this standard, however laudable, will be well-nigh impossible to interpret and enforce. For example, is your new 900 MHz cordless phone "adequately protected" if it doesn't work only once in, say, five tries? or once in twenty-five? What would you consider "acceptable interference" to an infant monitor, or to a security system? And I defy anyone to tell me what would

constitute "adequate protection" to the Part 15 device that controls traffic during emergencies in Orlando, Florida. Nor do I think that forcing the parties to negotiate with one another is likely to be productive at this point. If the record in this long-pending proceeding demonstrates anything beyond a shadow of a doubt, it demonstrates that the various users in this band are unlikely to reach consensus on much of anything.

And so back to my original point: in this case the only real choice the Commission has is to make the best of a less-than-optimal situation, and so we have tried. This may gratify some of the AVM interests who have desperately pleaded that, after such a lapse of time, ANY decision is better than NO decision. But it in no way gratifies me. Regulatory philosophies have come and gone over the years this proceeding has been pending, but the Commission's principal regulatory responsibility, regardless of the prevailing regulatory philosophy, is to prevent interference. And that is precisely what we may not have done here. In this light, perhaps the most important lesson we can learn from this experience is that the Commission must pay close attention to the details of how the new spectrum being transferred from government to non-government use is allocated and assigned so that we are never put in this type of position again.

Rarely do I sound so negative in discussing an item that I am, after all, not dissenting from. But in my judgment this Report and Order will be but our first step into a potential bog of interference problems. I sincerely hope I am wrong, but I fear I am right.

DISSENTING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

Re: Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems (PR Docket No. 93-61)

In this Report and Order, the Commission adopts rules for the future licensing and continued development of a number of services using the 902-928 MHz band, including Automatic Vehicle Monitoring (AVM) systems and unlicensed Part 15 devices. As a result of the proliferation of these valued services, the rules seek to accommodate operational needs for a range of technologies, such as licensed vehicle location and automatic toll collection systems, as well as unlicensed devices used for utility meter reading and inventory control, in order that both AVM systems and Part 15 devices are able to attain their respective service objectives without interference. This Report and Order adopts a new spectrum allocation plan, which will replace the interim rules that have allowed for sharing in this spectrum band, with: (1) separate sub-bands for licensed Location and Monitoring Services (LMS), which encompass the general AVM service as well as other advanced transportation-related services, and (2) a provision for three separate sub-bands for exclusive licensing of wideband multilateration LMS systems. Any mutually exclusive applications for use of the three sub-bands will be resolved through competitive bidding and multilateration licensees will not bar competitive secondary users under specified technical parameters.

After reviewing this decision, I cannot find substantial cause to disagree with this specific allocation for the 902-928 MHz band, especially to the extent this plan seeks to address many aspects of the record. I dissent to this decision, however, because of the lack of controlled testing prior to adopting the new band plan. As a consequence, I believe that the decision fails to balance the policy considerations in determining permanent rules for use of the shared spectrum in the 902-928 MHz band. Furthermore, I am concerned that this decision suddenly has been affected by a perceived time sensitivity for determining permanent rules, which has weighed against taking a step to provide for controlled testing. As a result, despite the many complexities of establishing rules for uses of this band and the significant time passed during the pendency of this proceeding, I am convinced that we have not determined a balanced and certain policy result for diverse AVM systems and Part 15 uses of the band. I would have preferred to wait the relatively brief period of time necessary to conduct controlled forms of testing of the proposed band plan. We also should have considered the policy consequences caused by the Commission's decision to allocate this spectrum rather than allowing the relative strengths and interests of the various companies to determine the technical parameters and an acceptable plan for sharing in the band.

The Commission's decision regarding the development of AVM systems and the use of the 902-928 MHz band should have considered the extent to which some form of

controlled testing would provide greater assurance regarding potential interference and to determine the implications of AVM operation under any new band plan. In order to reach a balanced public policy result for AVM systems and Part 15 devices in this band, I believe that the necessity of gathering more certain empricial information through controlled testing should have guided us in resolving the issues of potential interference in this proceeding. In the absence of such testing, I believe that any certainty that companies developing AVM systems may gain from a decision to replace the interim rules is undermined by the uncertainty for the public regarding the implications of the new band plan.

Without the opportunity for controlled testing prior to adopting permanent rules for AVM systems, I question the empirical basis for this decision. I observe that the nature of empirical evidence in record, which was intended for more narrow purposes of supporting or opposing the claims of parties regarding the impact of using a specific AVM technology, includes various technical studies that begin with different hypothetical conditions, and lead to divergent conclusions.[1] Although these studies might be considered "testing" as a basis for this decision, it is necessary to distinguish between these technical studies, which are subject to limitations and biases according to the interests of their sponsoring parties, as opposed to controlled testing for the purpose of demonstrating interference. I especially am concerned that the record's technical studies do not allow for similar assumptions or conditions. By comparison, controlled testing would use this new allocation of the 902-928 MHz band as a condition and then determine the potential for interference among AVM systems and Part 15 devices. Consequently, I believe that the record in this proceeding offers little indication regarding the potential implications for all interested parties, including the consumers and manufacturers of many Part 15 devices, such as cordless phones, baby monitors, and garage door openers. Additionally, while this decision may allow for yet another form of "testing" after determining permanent rules for AVM systems and allocating the band, I question the value of testing for interference after establishing a permanent band plan when the Commission will have limited recourse to prevent AVM systems and Part 15 devices from interfering with one another to ensure that uses of the band by all valued services will serve the public interest.

It is my opinion that the apparent time sensitivity of this proceeding, after many iterations of alternative band plans, amounts to a question of whether sufficient time has passed such that the need to move forward and provide final rules for use of the 902-928 MHz band should have outweighed the necessity of providing for controlled testing or a negotiated result. I especially am concerned by suggestions that in retrospect a negotiated process, with sufficient direction from the Commission, may now appear to have been worthwhile, or at a minimum, that controlled testing may have been useful at some point in the past. Similarly, I question whether a decision to provide for controlled testing eventually will not be viewed, at some point in the future, as the better result. Therefore, I believe that controlled testing should have been completed.

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[1] See Appendix B to Report and Order for summary of technical studies submitted in this proceeding.

February 3, 1995

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

RE: Automatic Vehicle Monitoring (AVM) Systems (PR Docket No. 93-61)

In this Report and Order we balance the competing spectrum needs of the authorized users of the 902-928 MHz band. This is a difficult task because of the wide range of services and equipment that share this band. The rules we adopt today do not fully satisfy all requests; however, I believe they represent a reasonable compromise. Moreover, they further the public interest by facilitating the growth of new and innovative services.

Entrepreneurial companies have made substantial investments to develop and market services and products that use this band. These companies understandably have been reluctant to make additional investments to upgrade or expand their service or products until we adopt final rules. Adoption of these rules promotes the public interest by removing this cloud of regulatory uncertainty and allowing these service providers to move ahead.

For example, these rules make permanent spectrum available for electronic tag readers, which are devices that can eliminate the need to stop for toll collection on highways and bridges, and thereby measurably facilitate the flow of traffic. These rules also accord new protections to many types of innovative unlicensed devices, such as wireless local area networks, cordless telephones and PBXs, remote utility meter reading devices, and wireless security alarm systems. Finally, these rules permit different types of radio location services to track and locate vehicles, an important asset to fleet managers and of potential use to locate emergency 9-1-1 callers using cellular or PCS telephones.

Over a period of years different services were authorized to operate in this band because it was underutilized and could support multiple applications without causing interference. That now is changing, with several million unlicensed devices already operating in this band and automatic vehicle monitoring (AVM) systems poised for substantial growth.

It is my expectation and hope that our adoption of these rules will spur providers to work together to engineer innovative solutions for spectrum sharing in areas where congestion occurs. Multilateration AVM licensees are required to locate and build their systems to avoid interference, and will receive only conditional licenses until they have tested and demonstrated that each system can co-exist with other users in their specific locality. These provisions are intended to ensure efficient use of the spectrum under real-world conditions, and users are expected to cooperate with each other to achieve the maximum use from this scarce resource.

I strongly support the continued availability of spectrum bands where new and innovative services can be implemented by sharing spectrum. But I also appreciate that sharing spectrum has practical limits. If demand for multiple services within the same band substantially increases and effective operation no longer is possible, new spectrum may be sought for the successful service. With this in mind, I will carefully consider requests for different spectrum from parties that now use the 902-928 MHz band but at some point no longer are able to operate efficiently in that band due to congestion.

In the meantime, the rules we adopt today ensure mutual coexistence by requiring new multilateration AVM systems to be tested in their actual locations and interference problems resolved before a final license will be granted. Our new rules also protect the continued operation of many unlicensed devices. The rules we adopt will, I believe, foster new technological growth in this band and result in new services being made available to the American public.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems

In this decision, the Commission adopts permanent rules for the operation of Automatic Vehicle Monitoring (AVM) systems in the 902-928 MHz band. I support the spectrum allocation plan we adopt in this order.

As a policymaker, it is my preference to strive for consensus among the parties, but when that is impossible to achieve, as it is here, it is the Commission's job to bite the bullet and make the tough choices with the public interest as our guide. I recognize that this AVM decision does not accommodate every party's stated needs, but I believe this decision is the best we can do at this time.

At the heart of the conundrum is the fact that many classes of licensees and operations make use of the 902-928 MHz band for different purposes pursuant to an established hierarchy of use. The band is allocated on a primary basis for use by Government radiolocation systems and Industrial, Scientific and Medical (ISM) equipment. AVM systems operate in the band on a secondary basis to these primary users. Amateur Radio Service licensees also operate in this band, but on a secondary basis to the ISM, Government and AVM users. Finally, Commission rules allow enhanced operation of spread spectrum devices in the 902-928 MHz band on an unlicensed basis, pursuant to Part 15 of our rules. Under our current rules, unlicensed Part 15 users must not cause interference to and must accept interference from all other users of the band.

The myriad uses of this band added a measure of complexity to the decision-making process in this proceeding and, in some cases, limited our flexibility. Virtually every choice we considered had impacts on multiple groups of users – and often impacted them in very different ways. At times, the record in this proceeding was supplemented by almost daily ex parte filings as the parties came forth to explain how various regulatory scenarios might impact their businesses and what they considered "not negotiable." This "point-counterpoint" activity, while intended to clarify the record, at times had the opposite effect. While not all parties will be content with this decision, be assured that I and my colleagues spent an extraordinary amount of time listening to all points of view, and reviewing the comments and the many ex parte supplements filed in this proceeding, in an attempt to ensure that we understood each party's position and weighed it carefully.

Some have suggested further delay. I note that the Commission adopted a Notice of Proposed Rulemaking in this proceeding in March 1993. For almost two years, the changes we proposed to our rules in that Notice have created great uncertainty for the users of the 902-928 MHz band. In my opinion, further regulatory uncertainty would be bad for our licensees' businesses and for continued development of AVM services. Our licensees deserve to have this issue finally decided. Thus, I believe the Commission must make the difficult decisions necessary to give the parties the certainty they need to go forward.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Allocation of Spectrum Below	)	ET Docket No. 94-32
5 GHz Transferred from	)	
Federal Government Use	)	

FIRST REPORT AND ORDER AND SECOND NOTICE OF PROPOSED RULE MAKING

Adopted: February 7, 1995 Released: February 17, 1995

Comment Date: **March 20, 1995**
Reply Comment Date: **April 4, 1995**

By the Commission:

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I. INTRODUCTION

1. By this action, we adopt allocations for and propose rules governing the use of 50 megahertz of spectrum, at 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz, that has been transferred from Federal Government to private sector use. In particular, we are providing 25 megahertz for use by unlicensed devices and the Amateur service and 25 megahertz for Fixed and Mobile operations. Specifically, we are allocating the 2390-2400 MHz band for use by unlicensed Personal Communications Services (PCS) devices, providing for continued use of the 2402-2417 MHz band by devices operating in accordance with Part 15 of our Rules, allocating both of these bands for use by the Amateur service on a primary basis, and allocating the band 4660-4685 MHz for use by Fixed and Mobile services. The 2390-2400 MHz and 2402-2417 MHz bands will be governed by existing applicable rules. We are proposing rules for use of the 4660-4685 MHz band. The allocations adopted herein will benefit the public by providing for the introduction of new services and devices and the enhancement of existing services and devices. These new and enhanced services and uses will create new jobs, foster economic growth, and improve access to communications by industry and the American public.

II. BACKGROUND

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993[1] (Reconciliation Act) was signed into law. The Reconciliation Act required that the Secretary of Commerce identify 200 megahertz of spectrum currently allocated for use by Federal Government agencies that could be transferred to private sector use. All of the 200 megahertz of spectrum recommended for reallocation must be located below 5 gigahertz, with at least 100 megahertz of this being below 3 gigahertz. The Reconciliation Act also required the Secretary of Commerce to issue within six months of its enactment a report making a preliminary identification of reallocable bands of frequencies and to issue within 18 months a final report recommending the spectrum for reallocation.[2] In its report making a preliminary identification of spectrum, the Department of Commerce was required to identify at least 50 megahertz of spectrum for immediate reallocation.[3] The remaining spectrum is to be made available over a ten-year period.[4]

3. In accordance with the requirements of the Reconciliation Act, on February 10, 1994, the Department of Commerce released its report making a preliminary identification of spectrum for reallocation (Preliminary Report).[5] The frequency bands identified for reallocation in the Preliminary Report are listed in Appendix A. Three of these frequency bands, 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz, were identified for immediate reallocation and are now available for private sector use.[6] The Reconciliation Act also requires that the Commission allocate, and propose regulations to assign, the 50 megahertz of spectrum that is immediately available no later than 18 months after its enactment (i.e., by February 10, 1995).[7]

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[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (approved August 10, 1993).

[2] See Reconciliation Act, § 6001(a)(3), as codified at 47 U.S.C. § 923.

[3] At least one-half of the 50 megahertz identified for immediate reallocation must be below 3 gigahertz and all of it must be identified for exclusive non-Federal use.

[4] Reconciliation Act, § 6001(a)(3), as codified at 47 U.S.C. § 923(e)(2)(A).

[5] Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, NTIA Special Publication 94-27, February, 1994.

[6] By letter dated October 27, 1994, the President of the United States notified the Chairman of the Commission that Federal Government frequency assignments in these bands have been withdrawn and that the National Table of Frequency Allocations has been modified to reflect the reallocation of these bands.

[7] Reconciliation Act, § 6001(a)(3), as codified at 47 U.S.C. § 925(a).

4. On May 4, 1994, we released a Notice of Inquiry (NOI) in this proceeding seeking information on potential applications for the 50 megahertz of spectrum that has been transferred from Federal Government use.[8] Following this, we released a Notice of Proposed Rule Making (NPRM) on November 8, 1994, proposing that all 50 megahertz of the transferred spectrum be allocated to Fixed and Mobile services.[9] We stated in the NPRM our belief that such a broad allocation would provide the greatest degree of flexibility, thereby allowing licensees to offer a wide range of services employing varying technologies.[10] We also indicated our belief that most services provided in this spectrum would meet the statutory criteria for auctions and proposed that licenses be offered through competitive bidding.[11] In addition to our basic proposal, however, we also discussed alternatives wherein these bands would be allocated to specific services.[12]

5. In response to our NPRM, we received 90 comments and 52 reply comments.[13] Several parties interested in providing commercial services supported our proposal for a Fixed and Mobile allocation scheme with licenses issued pursuant to competitive bidding.[14] However, most of the commenting parties oppose our proposal, based on a number of legal, technical, economic, and public interest arguments.[15] Most of the parties who oppose a general allocation also provide information regarding specific services that they believe should be accommodated in particular bands.[16]

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[8] Notice of Inquiry, 9 FCC Rcd 2175 (1994).

[9] Notice of Proposed Rule Making, ET Docket No. 94-32, 9 FCC Rcd 6779 (1994).

[10] Id. at 6780, para. 8.

[11] Id. at 6780-81, para. 9.

[12] Id. at 6781-83, paras. 12-22.

[13] See Appendices B and C.

[14] Comments of American Telecasting 4, Wireless Cable Association at 3-4, Wireless Holdings at 4-5, Leaco at 5, Pacific Bell Mobile at 1-2.

[15] See generally Comments of Alcatel Network Systems, American Petroleum Institute, APCO, AAR, County of LA, Forest Industries Telecommunication, ITA, LA County Sheriff, MRFAC, TIA, UTC, ARRL, WINForum, Apple, AT&T, Cincinnati Microwave, Compaq, EIA, Cylink, FSC, FLI, Metricom, Norand, Part 15 Coalition, Standard Microsystems, Symbol, Tetherless, Western Multiplex, Windata, Xircom, Loral/Qualcomm, Continental Airlines, In-Flight, MSTV, Motorola, and Bell Atlantic.

[16] A description of services proposed by commenters is contained in the discussion of comments for each band.

III. DISCUSSION

6. Based on the record in this proceeding, we believe that an approach that provides spectrum for both unlicensed devices and Fixed and Mobile services would best serve the public interest. Taking into account the unique nature of some of the bands under consideration, the current communications environment, and the suggestions of the commenting parties, we find it is desirable to allocate 25 megahertz for specific services and devices and 25 megahertz for Fixed and Mobile operations. Specifically, we are allocating the 2390-2400 MHz band for use by unlicensed PCS devices, providing for continued use of the 2402-2417 MHz band by other unlicensed devices operating in accordance with Part 15 of our Rules, allocating both of these bands for use by the Amateur service on a primary basis, and allocating the band 4660-4685 MHz for Fixed and Mobile services. Comments and issues relating to each of the specific bands are discussed below.

REPORT AND ORDER

2390-2400 MHz

7. **Background.** Internationally, 2390-2400 MHz is allocated in Region 2[17] on a primary basis to the fixed, mobile, and radiolocation services, and on a secondary basis to the Amateur service.[18] Domestically, this band is currently allocated on a secondary basis to the Amateur service. In its Preliminary Report, the Department of Commerce expresses concern over the effect of future non-Government use on the National Astronomy and Ionospheric Center, which operates a planetary research radar at Arecibo, Puerto Rico at 2380 MHz. To protect radio astronomy operations, the Department of Commerce states that the 2390-2400 MHz band should not be used for airborne or space-to-Earth links, and that restrictions on terrestrial operations in the vicinity of the Puerto Rico planetary research radar facility may be necessary.[19]

8. **Comments.** As with the NOI in this proceeding, we received a number of comments from Amateur radio licensees and organizations.[20] The 2390-2400 MHz band lies

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[17] See 47 C.F.R. § 2.104(b)(2) for a description of Region 2.

[18] See Table of Frequency Allocations, 47 C.F.R. § 2.106.

[19] Preliminary Report, section 4 at 14-17.

[20] See generally Comments of A. Frank Adamson, Ph.D., American Radio Relay League (ARRL), L. Stephen Bell, Northern California Packet Association, Northern Amateur Relay Council of California (NARCC), Palomar Amateur Radio Club, Inc., Robert S. Bennett, Ph.D., San Bernardino Microwave Society (SBMS), Southern California Repeater and Remote Base Association (SCRRBA), Western States VHF-Microwave Society, and William A.

within the 2300-2450 MHz frequency range, which is referred to as the 13 cm band by the Amateur service community. The Department of Commerce has proposed reallocating 35 megahertz of spectrum, at 2300-2310 MHz, 2390-2400 MHz, and 2402-2417 MHz, out of the total 70 megahertz of spectrum currently available for use by the Amateur service on a secondary basis in the 13 cm band.[21] Amateur service commenters contend that sharing between commercial licensees and the Amateur service is generally not possible because of the density and location of commercial users. These commenters describe the important contributions that the Amateur service makes by providing emergency communications, educational opportunities, and radio communications research. They contend that continued access to all or most of the 13 cm band is important to the Amateur service, because the band provides an opportunity for growth as lower bands become increasingly congested or are allocated for services other than the Amateur service. Accordingly, the Amateur service commenters request that all or most of the portions of the 13 cm band reallocated from Federal Government use be made available for the primary or co-primary use of the Amateur radio service or that any displaced Amateur services be accommodated in alternative bands.[22]

9. Comments were also received from a wide variety of users of private radio spectrum, including public safety, industrial, and land transportation radio service user organizations. These commenters dispute our position that private users can obtain service through commercial radio providers or that they can compete for spectrum on the same basis as commercial providers.[23] Private users argue that commercial systems are designed to

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Burns, and Reply Comments of Amateur Radio Council of Arizona, ARRL, James S. Kaplan, NARCC, Radio Amateur Satellite Corporation, SBMS, SCRRBA, and Amateur Television Network.

[21] Preliminary Report at Section 5.

[22] A number of commenters representing Amateur interests have suggested that the Department of Commerce make available portions of the 2310-2390 MHz band for use by the Amateur Radio Service to accommodate displaced Amateur users, or that the portions of 2300-2310 MHz band not be transferred in exchange for transferring spectrum above and adjacent to 2417 MHz. Reallocation of additional or alternative spectrum must be addressed by the Department of Commerce and is outside the scope of this proceeding. We note, however, that in our August 9th report to the Secretary of Commerce, FCC 94-213, we provided an analysis of comments received in response to the Preliminary Report along with our own comments and recommendations for consideration by the Department of Commerce for incorporation in its final report.

[23] NPRM, 9 FCC Rcd at 6782, para. 16. See generally Comments of American Petroleum Institute (API), Association of Public Safety Communications Officials (APCO), Association of American Railroads (AAR), County of Los Angeles (County of LA), Forest Industries Telecommunication (FIT), Industrial Telecommunication Association, Inc. (ITA), Los Angeles County Sheriff's Department (LA Sheriff), Manufacturer Radio Frequency

provide mainstream communications and generally cannot provide the specialized communications or data transmission requirements of many private users.[24] A number of the advanced specialized needs of private users are described in a Petition for Rule Making filed by the Coalition of Private Users of Emerging Multimedia Technologies (COPE).[25] Further, commenters state that commercial providers naturally concentrate their coverage in densely populated areas where demand is highest and do not provide sufficient coverage for private users that often require complete coverage throughout rural areas or areas that do not conform to normal commercial licensing areas that are based on economic trading considerations. Private users, in particular public safety organizations, also contend that the service provided by commercial providers is not reliable enough to meet critical safety needs nor do commercial systems have sufficient capacity to meet demand during peak use periods, particularly during emergencies or disasters when wired communications may be affected. Public safety organizations point out that they cannot afford to wait for an open channel when loss of life or property is at stake. Private users also contend that they must be able to dynamically control their communications systems in order to meet changing demands. Finally, private users maintain that it is unreasonable to expect private entities to compete against commercial service providers in bidding for spectrum because private entities do not have the fiscal resources that commercial entities have and, particularly in the case of public safety and local governments, have a longer planning cycle than commercial providers.

10. In-Flight Phone Corp., Inc. (In-Flight) asserts that the 2390-2400 MHz band should be allocated for use by a ground-to-air, aeronautical audio/visual service (AAVS) to provide live multi-channel audio and video programming for airline passengers.[26] In-Flight

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Advisory Committee (MRFAC), Motorola, Inc. (Motorola), Personal Communications Industry Association (PCIA), Telecommunications Industry Association (TIA), UTC, Alcatel Network Systems, Inc., and Reply Comments of API, AAR, ITA, Motorola, and Alarm Industry Communications Committee (AICC).

[24] PCIA in particular provides several examples of communications requirements, such as the needs of railroads, overnight delivery companies, airlines, and other very large users, that PCIA contends cannot be meet by commercial providers.

[25] COPE is a group consisting of a broad range of private land mobile users and user associations. In its petition, COPE argues that a need exists for an allocation of 75 megahertz of spectrum below 3 GHz for the development of an "Advanced Private Land Mobile Communications Service", which would accommodate the needs of private land mobile radio user communities for new operations such as advanced wireless imaging and decision processing/remote file access systems. COPE specifically suggests that spectrum be reallocated from the Federal Government, and it states that the most likely source of spectrum to accommodate private emerging technology needs lies in the spectrum to be reallocated under the requirements of the Reconciliation Act.

[26] In-Flight comments at 13-21.

had proposed this service in response to our NOI and we discussed AAVS as a possible use for this band in the NPRM.[27] Use of this band for AAVS is supported by American West Airlines, Capital Cities/ABC, and Continental Airlines.[28] Claircom Communications Group, L.P. (Claircom) generally supports a live audio/video service but urges that the Commission ensure that sufficient spectrum is made available to support several providers in a competitive environment and that the service be a two-way, interactive service.[29] A number of Amateur service commenters note that In-Flight was one of the few commenters that addressed the issue of sharing with the Amateur service and that AAVS might be an acceptable service provided that an AAVS/Amateur sharing arrangement could be developed.[30] Several commenters oppose allocating this band for AAVS, however, arguing that service would be limited to airline passengers rather than providing benefits to the broader population.[31]

11. Another option for this spectrum discussed in the NPRM was a proposal by Southwestern Bell (SWB) that the 2300-2310 and 2390-2400 MHz bands be paired and allocated for use in providing wireless local loop service, allowing local exchange carriers to provide wireless telephone service.[32] SWB filed additional comments bolstering its support for a wireless local loop service, claiming that allocation of this spectrum for such service would reduce overall installation costs for local telephone service, allow for faster introduction of new services, and allow faster recovery of operations in the event of a disaster.[33] Use of these bands for wireless local loop service is supported by Bell Atlantic, NYNEX, OPASTCO, Rochester Telephone, SR Telecom, TDS Telecommunications, the

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[27] NPRM, 9 FCC Rcd. at 6781, para. 12. We also note that, in an Ex Parte filing dated January 24, 1995, In-Flight states that AAVS could be provided at 4660-4685 MHz. In-Flight offers this as a possible alternative to providing AAVS at 2390-2400 MHz.

[28] American West comments at 1-2; ABC comments at 1-2; Continental Airlines comments at 2-4.

[29] See generally Comments of Claircom.

[30] See Reply Comments of the Amateur Radio Council of Arizona at 2, and ARRL at 13-16 and 29. ARRL has since, however, filed an Ex Parte presentation stating that sharing partners other than unlicensed PCS in the 2390-2400 MHz band, "are not promising." ARRL Ex Parte presentation dated January 26, 1995, at 2.

[31] Southwestern Bell (SWB) comments at 10; TDS Telecommunications Corp. (TDS) comments at 5; United States Telephone Association comments at 2.

[32] NPRM, 9 FCC Rcd. at 6781, para. 13.

[33] SWB comments at 1-6.

United States Telephone Association, and Tadiran Telecommunications.[34] These commenters claim that the 2300-2310 MHz and 2390-2400 MHz bands present an ideal and unique opportunity to implement wireless local loops because they can be paired to provide frequency division duplex operation, which is advantageous for wireless local loops because it would allow a system to serve twice the number of users per port transceiver compared to a system using time division duplex.[35] These commenters also state that these bands offer preferable propagation characteristics compared to spectrum above 3 GHz. These commenters also contend that it is not possible to provide wireless local loop service using spectrum allocated for Personal Communications Services (PCS) or the Basic Exchange Telecommunications Radio Service (BETRS) because of restrictions on use of those services. Avant-Garde claims that it currently provides a wireless local loop type service in the 38 GHz band, and that the benefits espoused by SWB as to the cost and reliability benefits of wireless local loops are indeed realistic.[36] Several commenters oppose allocating this spectrum for the use of wireless local loops because, they claim, it would not be a new service.[37]

12. Leaco Rural Telephone Cooperative (Leaco) states that the spectrum from the Federal Government should be used to provide interactive video, voice and data service in rural areas.[38] Pacific Bell Mobile supports a Fixed and Mobile allocation for the 2390-2400 MHz band and requests that we clarify that this band could be used as a source of additional PCS spectrum.[39]

13. The Loral/Qualcomm Partnership, L.P. (Loral Qualcomm) requests that the 2390-2400 MHz band be allocated for use by non-Geostationary (non-GSO) Mobile Satellite Service (MSS) Earth-to-space service links. Loral/Qualcomm states that the spectrum

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[34] Comments of Bell Atlantic at 2-3; NYNEX at 1-3; OPASTC at 2-3; Rochester Telephone at 1-2; SR Telecom at 2-5; TDS Telecommunications at 1-6; United States Telephone Association at 1-2 and; Tadiran Telecommunications at 2. Tadiran would also allocate the 2402-2417 MHz band for wireless local loops and would require that spread spectrum equipment be used. See also Reply Comments of Frontier Corporation, GTE, Interdigital Corporation, and the National Telephone Cooperative Association.

[35] See Comments of SWB at Appendix A.

[36] Avant-Garde comments at 2.

[37] In-Flight comments at 20-21, Apple comments at 8. Apple states that our Rules already adequately provide for this type of service. In-Flight claims that Section 7 of the Communications Act requires the Commission to prefer a new service over other types of service.

[38] Comments of Leaco at 1.

[39] Comments of Pacific Bell Mobile at 1-3.

currently allocated for MSS is insufficient to support the likely demand for MSS and that additional spectrum will soon be needed.[40] COMSAT Corporation (COMSAT) supports use of this band for MSS service uplinks.[41] We note, however, that in comments filed in response to the NOI in this proceeding, the American Mobile Satellite Corporation (AMSC) claimed that neither the 2390-2400 MHz nor the 2402-2417 MHz band was a viable candidate for providing MSS uplinks because of interference from ISM devices and Part 15 equipment operating in the 2400-2500 MHz band.[42] In reply comments to the NPRM, AMSC supports instead use of both the 2390-2400 MHz and the 2402-2417 MHz bands for MSS service downlinks.[43]

14. In our NPRM we raised the possibility of using either or both of the 2300-2310 MHz and 2390-2400 MHz bands to provide unlicensed PCS or to accommodate the Multipoint Distribution Service (MDS) that is currently provided in the 2150-2160 MHz band so that 2150-2160 MHz could be used for unlicensed PCS.[44] Apple Computer, Compaq Computer, Standard Microsystems, Software Publishers Association (SPA), and Symbol Technologies, Inc., support allocating the 2390-2400 MHz band for unlicensed Data-PCS (asynchronous PCS), citing the need for clear spectrum nationwide for implementation of nomadic devices that can be used anywhere at anytime.[45] Microsoft and IEEE support allocating 2390-2400 MHz for unlicensed use, but do not specify unlicensed Data-PCS.[46] Several wireless cable service providers have filed comments opposing relocating MDS from the 2150-2160 MHz band, stating that this service is still in its infancy and faces strong competition from cable companies, satellite broadcast services, and even telephone companies

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[40] Loral/Qualcomm comments at 2-4.

[41] COMSAT reply comments at 5.

[42] AMSC comments filed in response to NOI at 1-2.

[43] AMSC comments at 1-2. Such an allocation would conflict with the Preliminary Report's recommendation, which is supported by commenters in this proceeding, that the 2390-2400 MHz band not be used for space-to-Earth links. Preliminary Report, Section 4 at 14-17, comments of the National Research Council (NRC) at 5-7, comments of Cornell University and The National Astronomy and Ionosphere Center (Cornell) at 2-3, and comments filed in response to the NOI by Cornell University and NRC. AMSC argues, however, that these parties have not provided sufficient technical support for their position.

[44] NPRM, 9 FCC Rcd. at 6781, para. 14.

[45] Comments of Apple at 3-5; Compaq at 2-8; Standard Microsystems at 3 and; SPA at 6-8, reply comments of Symbol at 6-8.

[46] Comments of Microsoft at 5-6, and IEEE at 4.

that will provide video dial tone service. They argue that any disruption of service could be devastating to the industry and will be very expensive to implement.[47]

15. **Decision.** In the Second Report and Order in Gen Docket 90-314, concerning establishment of PCS, we determined that successful implementation of unlicensed PCS devices requires 40 megahertz of spectrum. Accordingly, we dedicated the band 1890-1930 MHz for use by unlicensed PCS devices, with 20 megahertz of spectrum each for asynchronous and isochronous operation.[48] Subsequently, in response to a number of petitions for reconsideration, we adopted a Memorandum Opinion and Order that modified the overall 2 GHz PCS allocation to better achieve our goals in developing the service. In doing so, however, we reduced the amount of spectrum dedicated for use by unlicensed PCS devices from 40 megahertz to 20 megahertz. We recognized that this would likely leave unlicensed PCS devices with insufficient spectrum to accommodate expected demand and indicated a commitment to pursue additional spectrum for such use.[49]

16. Considering the important contribution that we believe PCS will make in providing affordable, accessible communications for the public, we are committed to ensuring the successful implementation of such services. An important part of PCS will be the use of unlicensed devices to provide a wide variety of voice and data communications, particularly to interact with a larger information network. These devices have the potential to offer a portable "on-ramp" to the information highway that will be accessible to everyone. The potential for open access to the information infrastructure offered by unlicensed PCS devices will provide benefits, not only to commercial users, but also to individuals and private users. Accordingly, we believe that it is appropriate to fulfill our commitment to provide sufficient spectrum for unlicensed PCS data devices by allocating 2390-2400 MHz for use by unlicensed asynchronous PCS devices.[50] This band provides a unique opportunity to provide for these devices. As pointed out by several commenters, equipment manufacturers will need

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[47] Comments of Wireless Cable Association at 5; Wireless Holdings at 1-5 and; Home Box Office at 2-5.

[48] Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen Docket No. 90-314, 8 FCC Rcd 7700, 7777, para. 185 (1993).

[49] Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, Gen Docket No. 90-314, 9 FCC Rcd 4957, 4991, para. 87 (1994).

[50] Comments filed in support of allocating this spectrum for unlicensed PCS have all expressed the need for additional spectrum for asynchronous (data) use. We have received no comments requesting that 2390-2400 MHz be used for isochronous (voice and limited data) unlicensed PCS. We are not, however, making a determination at this time that there is not a need for additional spectrum for isochronous use.

to relocate existing fixed microwave users out of the 1910-1930 MHz band, which we previously dedicated for unlicensed PCS use, before that band can be widely used by unlicensed PCS devices, particularly nomadic devices. Our action today will provide spectrum for immediate implementation of unlicensed nomadic PCS data operations.

17. We will regulate these unlicensed PCS devices in accordance with Part 15 of our Rules. Devices operating under Part 15 have generally proven to be effective in operating in shared environments with other services, including in frequency bands shared with the Amateur service. We recognize the value of maintaining adequate spectrum for the Amateur service and we believe that the generally robust nature of PCS devices will make it feasible for unlicensed PCS devices and Amateur operations to operate on a shared basis in this band. In addition, both Apple and the ARRL believe that shared use of this band is possible.[51] Accordingly, we are providing for the continued availability of the 2390-2400 MHz band for Amateur operations, and are increasing the status of the Amateur service in this band to primary.[52] Considering past experience of Part 15 devices and Amateur service users operating in a shared environment, we do not believe that it is necessary to adopt specific provisions for protecting either of these operations.

18. While we have considered allocating this band for Fixed and Mobile services or for a number of specific services proposed by commenters in this proceeding such as, AAVS, wireless local loops, and MSS, we believe that use by new unlicensed PCS and continued use

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[51] Apple comments at 4-5 and 10, ARRL Ex Parte presentation dated January 26, 1995. Compaq argues that 2390-2400 MHz should be allocated for exclusive use by unlicensed PCS and that doing so will not excessively disrupt Amateur service operations. Compaq comments at 4. Compaq does not, however, provide details as to the potential for the Amateur service to adversely impact unlicensed PCS operations. Absent compelling information to the contrary, we believe that it is appropriate to provide continued access to the band by the Amateur service.

[52] While our decision today upgrades availability of the 2390-2400 MHz and 2402-2417 MHz bands for the Amateur service from secondary to primary, we are not making a determination at this time as to the continued availability of the 2300-2310 MHz band for the Amateur service. We intend to carefully consider the benefits of continued Amateur service access to 2300-2310 MHz in future decisions. In its January 26, 1995, Ex Parte presentation, ARRL requests that the Amateur service be given primary status in the entire 2390-2450 MHz band. The 2400-2402 MHz and 2417-2450 MHz portions of this band remain allocated for primary use by Federal Government stations and have not been identified for transfer to non-Government use. ARRL's request is, therefore, outside of the scope of this proceeding. We note, however, that the justification provided in the Department of Commerce Preliminary Report for not reallocating the 2400-2402 MHz portion was due to its current use by the Amateur service and we expect that such use will continue to be accommodated. See Department of Commerce Preliminary Report at 4-17.

by the Amateur service represents the greatest opportunity for using this band to benefit the public. We believe that allocation of this band for unlicensed PCS will lead to the development of new and unique devices and applications that can be provided in a cost effective manner and will be available to virtually every person in the nation.[53] Such devices will increase American productivity by allowing business to operate more efficiently and will allow more people to access information in a variety of ways from almost any location. Amateur service use of this band will allow these users to continue to develop radio communication technologies through experimentation, provide communications during emergencies and natural disasters, and provide education in the area of radio communication.

19. There are a number of additional reasons for using 2390-2400 MHz for unlicensed PCS as opposed to other proposed services. Concerning our proposal to allocate this band for Fixed and Mobile services, we believe that the recent allocation of 120 megahertz of spectrum at 2 GHz for general mobile services in the form of broadband PCS is sufficient to satisfy the needs of general mobile service providers in this frequency range at this time. Moreover, an allocation for Fixed and Mobile use would be incompatible with continued use of this band by the Amateur service.

20. The wireless local loop service proposed by Southwestern Bell is also incompatible with continued use of this band by the Amateur service. Although Southwestern Bell has addressed this concern, the solutions proposed would either result in a significant decrease in the amount of spectrum available to the Amateur service or would require allocation of alternate spectrum for the Amateur service. Further, we believe that wireless local loop service could be provided in spectrum allocated for broadband PCS in the 1850-1990 MHz band. Although our rules specify that Fixed services provided under PCS must be ancillary to mobile operations,[54] we have attempted to provide licensees with flexibility to determine how this spectrum is used and we would entertain waiver requests to provide primary Fixed service in this spectrum for certain applications if a licensee demonstrates that a Fixed service best meets the demands of an area.[55] We also note that a number of

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[53] Our decision should not be interpreted as a general policy statement regarding the relative merits of these various uses. It is merely reflects our belief that, for reasons limited to this band and the communications environment at this time, the public will receive the greatest benefit from use of this band for unlicensed PCS. We also note that we have initiated a proceeding to pursue additional spectrum for MSS. See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, Notice of Proposed Rule Making ET Docket No. 95-18, FCC 95-39, released January 31, 1995.

[54] 47 C.F.R. § 24.3.

[55] As we stated in determining what services could be provided under PCS, fixed services can generally be accommodated in other bands. Second Report and Order, Gen Docket 90-314, 8 FCC Rcd 7700, 7712, para. 23 (1993). A recent staff letter clarifying

proponents of the wireless local loop service have stressed the need for such service in rural areas. It seems likely that, in these rural areas, broadband PCS systems will have sufficient capacity to accommodate wireless local loops. This service could be provided either directly by the broadband PCS licensee or through a secondary provider operating under the licensee's authority.[56]

21. Regarding proposed use of 2390-2400 MHz for provision of an aeronautical audio/visual service (AAVS), we note that this service would be limited to airline passengers, rather than the general public. We believe that other spectrum or other alternative possibilities should be considered for such a service. For example, In-Flight has stated that AAVS could be accommodated in the 4660-4685 MHz band,[57] and, if an AAVS provider is able to obtain a nationwide license, AAVS can be provided as a Mobile service in that band. Finally, concerning possible use of this band for MSS, the Commission is currently considering allocation of an additional 70 megahertz of spectrum in the 2 GHz band and we believe this may be sufficient to satisfy MSS needs in this frequency range at this time.[58]

22. As discussed above, we received comments from a number of entities seeking use of this spectrum to satisfy the needs of private spectrum users, particularly as described in the Petition for Rule Making filed by COPE. Although we have not allocated this spectrum for private use, we believe that the types of uses provided by unlicensed PCS devices, as well as unlicensed devices operating under Part 15 of our Rules in the 2400-2483.5 MHz band, will meet some of the requirements described by COPE as they relate to data and information transfer.[59] In addition, we have released a report evaluating the needs of the public safety

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permissible uses of PCS spectrum, notes that the Commission intended the definition of PCS to be sufficiently inclusive to accommodate a wide range of services and technologies, including new and creative applications. Letter to A. Carroccio from R. Keeney, Chief, Wireless Telecommunications Task Force, Nov. 15, 1994, at 1.

[56] In addition, our Rules allow a PCS licensee to assign portions of its licensed PCS spectrum after January 1, 2000, provided it has met the five-year construction requirements. 47 C.F.R. § 24.229(d). Geographic partitioning to rural telephone companies is also permitted under Section 24.714 of the Commission's Rules.

[57] See In-Flight Ex Parte filing dated January 24, 1995.

[58] See Notice of Proposed Rule Making, ET Docket No. 95-18, FCC 95-39, released January 31, 1995.

[59] In addition, additional capacity for private systems may be gained through implementation of spectrum efficient technologies. See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, Notice of Proposed Rule Making, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992).

community through the year 2010 and we will consider the recommendations in this report as additional spectrum becomes available.[60]

23. We will regulate unlicensed PCS devices in accordance with the technical standards currently embodied in Part 15, Subpart D of the Rules. Because we already have existing rules for unlicensed PCS in place, we believe that it is appropriate to apply them to devices that will use the 2390-2400 MHz band. Accordingly, the power levels, emission limits, and the spectrum etiquette for unlicensed PCS devices operating at 2390-2400 MHz shall be consistent with requirements for asynchronous devices operating at 1910-1920 MHz. Also consistent with use of the 1910-1920 MHz band, asynchronous devices operating in the 2390-2400 MHz band must have a bandwidth of 500 kHz or greater. Unlike the 1910-1930 MHz band, there are no incumbent users in the 2390-2400 MHz band that must be relocated prior to wide-spread use of the band for unlicensed PCS. Therefore, we will not require that unlicensed PCS devices operating at 2390-2400 MHz be coordinated through UTAM.[61]

24. We note that the Notice did not contain a specific discussion of technical rules for unlicensed PCS devices. However, we have concluded that an additional notice and comment period regarding rules for unlicensed PCS devices is unnecessary and would be contrary to the public interest. First, it is unnecessary because we already have rules in place governing the operation of unlicensed asynchronous PCS devices. Our action here merely provides additional spectrum for such use. Second, providing a notice and comment period would be contrary to the public interest because it would unnecessarily delay the availability of unlicensed PCS devices and the benefits that these devices will provide to the public. Accordingly, pursuant to Section 553 of the Administrative Procedures Act we find good cause for adopting these slight modifications to Part 15 of the Rules without notice and comment, 5 U.S.C. § 553(b)(3)(B).

2402-2417 MHz

25. The 2402-2417 MHz band is allocated internationally in Region 2 on a primary basis to the fixed, mobile, and radiolocation services, and on a secondary basis to the amateur service.[62] Domestically, the band is currently allocated on a secondary basis to the amateur service. The 2402-2417 MHz band lies within the 2400-2500 MHz band that is available for

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[60] See Federal Communications Commission, REPORT AND PLAN: MEETING STATE AND LOCAL GOVERNMENT PUBLIC SAFETY NEEDS THROUGH THE YEAR 2010, FCC 95-55, released Feb. 9, 1995.

[61] Prior to operation, unlicensed PCS devices at 1910-1930 MHz must be coordinated by the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition Management (UTAM). See 47 C.F.R. § 15.307.

[62] See Table of Frequency Allocations, 47 C.F.R. § 2.106.

use by industrial, scientific, and medical (ISM) applications.[63] Radio services operating within this band must accept harmful interference that may be caused by ISM devices, which include a large number of microwave ovens commonly used in households. In addition, the 2400-2483.5 MHz band is available domestically for use by equipment authorized under Part 15 of the Rules.[64]

26. As described previously, the 2402-2417 MHz band lies within the Amateur service 13 cm band. Amateur comments regarding reallocation of portions of the 13 cm band have already been discussed in the preceding paragraphs,[65] and the points made with regard to reallocation of 2390-2400 MHz apply to this band as well.

27. We received very few comments recommending uses for the 2402-2417 MHz band other than for the Amateur service or continued Part 15 use. In general, commenters argue that use of the band for ISM equipment severely limits the band's utility for provision of commercial services. Several ISM equipment manufacturers express concern that allocating 2402-2417 MHz for a licensed commercial service, especially if licenses are issued via competitive bidding, could adversely affect ISM use of the band in the future.[66]

28. Only a few commenters support commercial use of 2402-2417 MHz. Tadiran urges that Part 15 use of the band be phased out and that the band be made available for implementation of wireless local loop service using spread spectrum technology.[67] Pegasus Communications, Inc. argues that the band should be used for a low power mobile service for video production use.[68]

29. Loral/Qualcomm, supported by AMSC and COMSAT, seeks use of the band for non-GSO MSS service links in the space-to-Earth direction, stating its belief that Part 15 and ISM use of the band will have minimal impact on MSS operations.[69] AMSC believes that

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[63] See Table of Frequency Allocations, 47 C.F.R. § 2.106. See also 47 C.F.R. Part 18.

[64] Part 15 provides for operation of unlicensed low-power devices.

[65] Para. 8, supra.

[66] Comments of Fusion Systems Corporation (FSC) at 4, Fusion Lighting, Inc. (FLI) at 1-2. Reply comments of SUNSAT Energy Council, International Space Power Program, American Institute of Aeronautics and Astronautics, and ETM Solar Works.

[67] Tadiran comments at 2-3.

[68] Pegasus comments.

[69] Loral/Qualcomm comments at 3, 4-5 AMSC reply comments at 2-3, and COMSAT reply comments at 5.

interference between MSS providers and other users of the band can be handled on a case-by-case basis.[70]

30. More than one-third of the comments received in response to the NPRM were filed by manufacturers of Part 15 devices, particularly manufacturers of wireless local area networks (LANs) and devices that interact with wireless LANs.[71] These commenters note that, since the Commission encouraged development of unlicensed spread spectrum systems in the 902-928 MHz, 2400-2483.5 MHz, and 5700-5825 MHz bands, the industry has responded with a wide variety of products, including digital cordless telephones, electronic article surveillance equipment, utility metering devices, fire and security alarm devices, wireless bar code readers, collision avoidance systems, and wireless LANs. They contend that these Part 15 devices provide the kind of spectrum efficient uses, new technologies, and open competitive markets that the Commission is trying to promote. The LAN MAN Standards Committee of the IEEE, IEEE 802, and other parties filed comments discussing the work that has gone into developing standards for wireless LANs based on current Part 15 Rules for this band. These commenters note that 2400-2483.5 MHz is increasingly available internationally for Part 15 type use and it is likely that the IEEE 802 standard will be used internationally. They argue, therefore, that it would undermine the nation's international competitiveness if the Commission adversely affects Part 15 use of the band. The commenters urge that the 2402-2417 MHz portion of the band be retained for Part 15 use without disruption by high power licensed systems. Some commenters argue that the status of Part 15 use should be raised to primary.

31. Several parties seeking spectrum for private uses urge that 2402-2417 MHz be allocated for licensed use by private radio services, particularly for advanced private systems as described by COPE.[72] On the other hand, API, TIA, UTC, and Motorola, all entities that are generally strong proponents of allocating spectrum for private radio services, oppose

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[70] AMSC reply comments at 3.

[71] See generally Comments of 3Com Corporation (3Com), Advanced Micro Devices, Inc. (AMD), Andrew Corporation (Andrew), Apple Computer, Inc. (Apple), AT&T, Brian Robinson, Cincinnati Microwave, Compaq Computer Corporation (Compaq), Consumer Electronics Group of the Electronics Industries Association (EIA), Cylink Corporation (Cylink), IEEE 802, International Business Machines Corporation (IBM), Metricom, Inc., Microsoft Corporation (Microsoft), Norand Corporation (Norand), Part 15 Coalition, Rockwell International Corp. (Rockwell), Standard Microsystems Corporation (SMC), Symbol Technologies, Inc. (Symbol), Tetherless Access LTD. (TAL), Western Multiplex Corporation (WMC), Windata, Inc., Wireless Information Networks Forum, Inc. (Winforum), Xircom, Inc. and Reply Comments of AMD, Apple, AT&T, Claircom Communications Group, L.P, Compaq, Cylink, Interdigital Communication Corporation, IBM, Micron Communications, Inc., Part 15 Coalition, Metricom, Symbol, Andrew, Proxim, Inc.

[72] Comments of County of LA at 3, FIT at 6, ITA at 11-12, and MRFAC at 8.

licensed use of 2402-2417 MHz, arguing instead that the band should remain available for use by Part 15 devices because of the broad utility of Part 15 equipment, including for private users.[73] UTC urges the Commission to place spread spectrum Part 15 devices into a new Part 16 and accord these devices primary status in the band.[74]

32. **Decision.** Commenters expressed only limited interest in use of the 2402-2417 MHz band for licensed commercial services. In contrast, there was significant concern expressed about maintaining use of the band by Part 15 devices. As described above, this band lies within 2400-2483.5 MHz, which is available for use by spread spectrum devices under Part 15 of our Rules. Eliminating Part 15 use of 2402-2417 MHz would severely reduce the amount of spectrum available to Part 15 devices, and could significantly impair the ability of Part 15 devices to operate in the 2400-2483.5 MHz band by forcing them to operate entirely in portions of the band most affected by ISM devices and by limiting their information capacity. These Part 15 devices provide a variety of consumer and business oriented services that benefit individuals, commercial services, and private spectrum users, and they also have applications for public safety and medical needs. Benefits include lower costs of energy through automatic meter reading and optimized power generation, low-cost broadband access to Internet services and other information networks for schools, libraries, telecommuters and home offices, mobility of telephonic and computer communications within offices and homes without extensive reconstruction and wiring, immediately installable video conferencing among and between buildings for educational instruction, health care monitoring and judicial procedures without construction of special studio facilities, safe transport of chemicals and petroleum products through low-cost and easily deployable pipeline monitoring services, and control for potentially tens of thousands of traffic lights, at less than one-third the cost of wireline solutions, to ease road congestion, and significantly reduce pollution and new street construction.[75] These and other applications of technologies implemented through Part 15 devices have the potential to benefit virtually every person and business in the nation, as well as to promote American competitiveness abroad. Considering the universal benefits provided by part 15 equipment, the potential growth for new technologies in this area, and the difficulty of implementing commercial services in this band, we find that the public is best served by providing for the continued availability of this band for Part 15 equipment.

33. One of the principal Part 15 uses being implemented in the 2400-2483.5 MHz band is wireless LANs. Commenters have provided sales figures demonstrating a rapidly expanding market for wireless LAN equipment with sales of $200 million for 1994 and expected sales as high as $2.5 billion dollars by 1998.[76] Disrupting Part 15 use of 2402-

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[73] Comments of API at 7-8; TIA at 2 and 10; UTC at 14; and Motorola at 10-14.

[74] UTC comments at 14.

[75] See, e.g., Cylink comments at 4.

[76] Comments of IBM at 11; Symbol at 5; and Norand at 6.

2417 MHz could affect the market as well as the ability of U.S. firms to compete in the worldwide market for wireless LANs. In addition, manufacturers would have to modify equipment designed to operate throughout the 2400-2483.5 MHz band at a time when considerable resources have been expended on equipment development but when manufacturers have not yet recouped their investment because the equipment is just now becoming widely available.

34. In addition to maintaining availability of 2402-2417 MHz for use by Part 15 equipment, we are also providing for continued use of this band by the Amateur service and upgrading the band from secondary to primary use by the Amateur service. Both Part 15 manufacturers and Amateur service licensees are familiar with operating in a shared radio environment, and we are unaware of any conflicts that have occurred between Part 15 devices and Amateur operations in this band. This action will essentially preserve the status quo regarding use of this band.[77]

35. We decline to allocate the band for other uses proposed by commenters. None of the parties that support use of this band for MSS support their belief that MSS is compatible with Part 15 or ISM use of the band. MSS is also not compatible with Amateur use of the band. In addition, we are currently considering allocation of an additional 70 megahertz of spectrum in the 2 GHz band that may be sufficient to satisfy MSS needs in this frequency range at this time.[78] Tadiran's proposal to use this band for wireless local loops is part of a larger proposal by Tadiran to allocate the 2300-2310 MHz, 2390-2400 MHz, and 2402-2417 MHz bands for spread spectrum wireless local loops that Tadiran states would meet the technical requirements for spread spectrum systems under Part 15 of our Rules.[79] However, we have made the 2390-2400 MHz band available for unlicensed PCS devices, and without that band Tadiran's plan would be incomplete. We believe that the public is benefitted more by allowing the greatest number of possible uses of this band under Part 15 of the Rules rather than by restricting use to one type of application. We note that Tadiran would be able to use this band for spread spectrum wireless local loops under Part 15 of our rules, although not on an exclusive basis. The proposal by Pegasus to use this band for video production use would result in relatively limited benefits to the public when compared to the amount and types use provided by Part 15 devices operating in this band. In addition, as we noted in our decision regarding the 2390-2400 MHz band, while we have not allocated this band for the

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[77] Our action today does not affect use of this band by ISM equipment. ISM use of this frequency band will continue in accordance with Part 18 of our Rules, 47 C.F.R. Part 18. Other radio services operating in this band must accept harmful interference which may be caused by ISM applications. See footnote 752 to the Table of Frequency Allocations, 47 C.F.R. § 2.106.

[78] See note 53, supra.

[79] Tadiran comments at 2-4.

exclusive use of private users, we believe that unlicensed devices operating under Part 15 of our Rules will meet some of the needs of private users.[80]

4660-4685 MHz

36. Internationally, 4660-4685 MHz is allocated in Region 2 on a primary basis for fixed, fixed-satellite, and mobile services.[81] This band is allocated domestically on a primary basis for non-government fixed-satellite service space-to-Earth links, with use limited to international inter-continental systems.[82] However, there is currently no non-Government use of this band.[83]

37. The Association for Maximum Service Television, Inc. (MSTV) in a joint filing with a number of television broadcast entities reasserts its request, discussed in the NPRM, that 4660-4685 MHz be allocated for use by the broadcast auxiliary service to support digital advanced television and possibly to relieve congestion in the 1990-2110 MHz band. MSTV claims that no other service has made a compelling argument for requiring use of the 4660-4685 MHz band and that implementation of advanced television will provide the greatest benefit to the public.[84] This is also supported by the Society of Broadcast Engineers, Inc.[85]

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[80] See para. 22, supra.

[81] See Table of Frequency Allocations, 47 C.F.R. § 2.106. Use of the fixed-satellite service (space-to-earth) at 4500-4800 MHz is subject to an allotment plan contained at Appendix 30B of the international Radio Regulations.

[82] See Table of Frequency Allocations, 47 C.F.R. § 2.106. The fixed-satellite service in this band is also subject to case-by-case electromagnetic compatibility analyses. See U.S. allocation footnote 245.

[83] An agreement with Canada requires that certain United States Government terrestrial line of sight and troposcatter systems be coordinated with Canada. This agreement also permits use of this band by airborne or other mobile stations but requires that such stations protect Canadian systems. See Sharing Arrangement Between the Department of Communications of Canada and the National Telecommunications and Information Administration of the United States Concerning the Use of the Band 4400-5000 MHz, signed August 29, 1986. Because this agreement was between the NTIA and the Canadian Department of Communications it will be necessary, in the future, to evaluate and renegotiate an agreement between the FCC and the Canadian Government for non-Government use of this band.

[84] MSTV comments at 2-10.

[85] Reply comments of the Society of Broadcast Engineers.

38. Other parties request that the band be allocated for private fixed microwave to accommodate systems being displaced from the 2 GHz PCS bands. They dispute our belief that adequate provision has been made to reaccommodate fixed microwave systems displaced by PCS.[86] These parties argue that additional spectrum for reaccommodation of displaced fixed microwave operations is needed. Alcatel claims that discrepancies between protection criteria for fixed microwave systems and fixed-satellite systems operating in the 3700-4200 MHz band limit the usefulness of that band for reaccommodation of fixed users displaced from the 2 GHz PCS band.[87] As noted by Alcatel, however, accommodation of displaced fixed point-to-point systems requires use of paired spectrum with sufficient frequency separation between pairs. Alcatel argues that at least 100 megahertz of spectrum is required to accommodate the necessary frequency pairs and urges the Department of Commerce to identify an additional 50 megahertz of spectrum in this frequency band for reallocation to private sector use.[88]

39. Loral/Qualcomm advocates using this band for Earth-to-space feeder links to support non-GSO MSS. Although this band is already allocated for Fixed Satellite Service (FSS) space-to-Earth links and is part of the FSS allotment plan in Appendix 30B of the international Radio Regulations, Loral/Qualcomm states that their proposal to implement reverse band working of this spectrum, without interfering with FSS operations, is supported by papers submitted to ITU-R Working Party 4A and Task Group 4/5.[89]

40. Several commenters suggest that this band be used to provide a variety of wireless interactive services. Proposals as to how this would be implemented vary. American Telecasting favors our proposal for a general allocation, with licenses awarded by auction, but it would have the Commission restrict eligibility to those entities already providing service to paying subscribers within a market.[90] Leaco Rural Telephone Cooperative, Inc. also favors a general allocation but wants rural telephone exchange carriers to have a preference for obtaining spectrum in certain areas.[91] Wireless Holding, Inc. and the Wireless Cable Association International both support our proposal for a very flexible

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[86] API comments at 8-9, Alcatel comments at 8-9.

[87] Alcatel comments at 8-9.

[88] Alcatel comments at 9. An additional 50 megahertz of spectrum, combined with the 4635-4660 MHz band that was also identified for reallocation in the Preliminary Report, would result in a total of 100 MHz.

[89] Loral/Qualcomm comments at 5-6.

[90] American Telecasting comments at 4-6.

[91] Leaco comments at 5-9.

allocation and urge us to not adopt overly restrictive eligibility or technical rules.[92] Finally, Tadiran proposes that 4660-4685 MHz be used for in-building communications.[93]

41. **Decision.** We are adopting a Fixed and Mobile allocation in the 4660-4685 MHz band. We have weighed the benefits of allocating this band for the services proposed by commenters, but remain convinced that the public will receive the greatest benefit by allocating the 4660-4685 MHz band to the Fixed and Mobile services, regardless of whether the ultimate use of this spectrum is for private services, non-subscriber services, or subscriber-based services .

42. A number of commenters argue that if we adopt such an allocation we would not fulfill our responsibility under Section 303 of the Communications Act which requires that we classify radio stations and prescribe the nature of the service to be rendered by each radio station.[94] As explained below, we believe that an allocation to Fixed and Mobile services is permissible under the Communications Act and, for the 4660-4685 MHz band, we find that a Fixed and Mobile allocation is in the public interest. Therefore, we reject the arguments advanced by commenters.

43. The Commission is required by the National Telecommunications and Information Administration Organization Act (NTIAO Act) to issue regulations to allocate the 50 megahertz of spectrum that the Secretary of Commerce identified and recommended for immediate reallocation from Government use no later than 18 months from enactment of the Reconciliation Act.[95] For purposes of this portion of the NTIAO Act, the term "allocation" is defined as "an entry in the National Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more radiocommunication services" (emphasis added).[96] The Table of Frequency Allocations often contains allocations to more than one type of service[97] and such allocations are specifically authorized in this instance by the

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[92] Comments of Wireless Holdings, Inc. at 4-5, and the Wireless Cable Association International at 1-7.

[93] Tadiran comments at 2.

[94] See Comments of Continental Airlines at 2, FIT at 3, In-Flight at 3-6, MRFAC at 4, Metricom at 10-13, Motorola at 15-17, TIA at 4, UTC at 3 and Winforum at 8. 47 U.S.C. §§ 303(a), 303(b).

[95] Section 115(a) of the National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 925(a).

[96] Section 111(1) of the National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 921(1) (emphasis added).

[97] See 47 C.F.R. § 2.106.

NTIAO Act. Therefore, our allocation of the 4660-4685 MHz band to Fixed and Mobile Services is permissible and consistent with established practice.

44. We believe that such an allocation is consistent with the Commission's obligations under the Communications Act. The Commission has very broad authority under the Communications Act to allocate spectrum. Our authority derives from Section 303 of the Communications Act, which provides:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --
>
> (a) Classify radio stations;
>
> (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
>
> (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station . . . .[98]

Nothing in the language of Section 303 establishes or suggests any limitation or restriction on the Commission's discretion to prescribe the nature of the service to be rendered over radio frequencies or its authority to assign (or allocate) frequencies to the various classes of stations. Moreover, nothing in the language of Section 303 or its legislative history suggests that the Commission is prohibited from assigning spectrum to stations for more than one permissible use, or otherwise limits the Commission's discretion in making spectrum allocations that it deems to serve the public interest.[99] With respect to allocation decisions, courts have accorded "substantial deference" to Commission determinations.[100]

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[98] 47 U.S.C. § 303(a)-(c)

[99] Other sections of the Communications Act support the view that Congress expected the Commission to utilize some amount of spectrum for particular types of services. See, e.g., 47 U.S.C. § 309(b) (referring to fixed point-to-point microwave stations, industrial radio positioning stations, and aeronautical stations); 47 U.S.C. § 319 (distinguishing between amateur stations, mobile stations, public coast stations, privately owned fixed microwave stations, common carrier stations, and broadcast stations). Nevertheless, these sections cannot be read to limit the Commission's discretion to permit the use of some spectrum for more broadly defined services.

[100] See National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 636 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976); see also Telocator Network of America v. FCC, 691 F.2d 525, 549 (D.C.Cir. 1982).

45. Commission precedent also supports the permissibility of allocating spectrum in a manner that allows for its use by a broadly defined service. In 1986, the Commission allocated 2 MHz of spectrum for a new General Purpose Mobile Service (GPMS) accessible to all land mobile, maritime mobile, and aeronautical mobile uses.[101] In that instance, the Commission found that its GPMS allocation served the public interest.[102] The Commission rejected claims that such an allocation was unlawful, noting that "[n]othing in Sections 303(a)-(c) suggests the Commission is not permitted to take into account marketplace forces when exercising its spectrum allocation responsibilities under the public interest standard."[103] Our current approach is also similar to that taken in our Emerging Technologies proceeding, ET Docket No. 92-9. In that proceeding, the Commission allocated 220 megahertz of spectrum to the Fixed and Mobile services and identified it for use by emerging technologies. Later, we permitted PCS providers to use 140 megahertz of this spectrum.[104] We disagree with the contention made by some commenters that the current approach differs from that applied in allocating spectrum for PCS.[105] While we envision service rules designed to accommodate a variety of uses, as with PCS, we have no intention of abdicating our responsibility to provide a regulatory structure that is sufficient to provide for use of the spectrum that is in the public interest. The necessary extent of such a structure is explored in the Notice of Proposed Rule Making section of this item.

46. Our allocation is also not so broad as to permit use of the 4660-4685 MHz band for any purpose. Allocation to the Fixed and Mobile services will allow licensees to use the spectrum to provide any Fixed service, including Aeronautical Fixed, fixed point-to-point, and fixed point-to-multipoint systems, and any Mobile service, including Aeronautical mobile, Land mobile, or Maritime mobile service. The allocation would not, however, allow licensees

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[101] Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications System, Report and Order, GEN Docket Nos. 84-1231, 84-1233, 84-1234, 2 FCC Rcd 1825, 1841 (1986), recon. denied, 2 FCC Rcd 6830 (1987).

[102] Id. at 1840.

[103] Id. at 1839. We note that this flexible use spectrum was never licensed. We ultimately reallocated this spectrum for narrowband personal communications services (PCS).

[104] See generally Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Memorandum Opinion and Order, 9 FCC Rcd 5031 (1994).

[105] A broad variety of services are permitted under PCS. See Section 24.3 of the Rules which permit PCS licensees to, "provide any mobile communications service on their assigned spectrum. Fixed services may be provided only if ancillary to mobile operations. Broadcasting as defined by the Communications Act is prohibited." 47 C.F.R. § 24.3.

to use the spectrum for Broadcast services, Radiolocation services, or any Satellite services, including the Broadcast or Mobile Satellite Service.[106]

47. Although the majority of commenters oppose our proposal, we note that we did receive support for a Fixed and Mobile allocation. Wireless Holdings, Leaco Rural Telephone Cooperative (Leaco), American Telecasting, Pacific Bell Mobile Systems, and the Wireless Cable Association (WCA) support a fixed and mobile allocation for some or all of the spectrum under consideration and have expressed an interest in providing commercial services.[107] Several of these commenters would restrict licensee eligibility to some degree.[108] Additionally, UTC believes that a Fixed and Mobile allocation for commercial services is appropriate, provided that the needs of private users are satisfied in bands specifically set aside for private users.[109]

48. In this instance, we find that an allocation for Fixed and Mobile services is not only permissible under the Communications Act, but will also serve the public interest, regardless of whether the ultimate use of the spectrum is for private or commercial services. We believe that such an allocation will ensure that the spectrum is used for services that are most highly valued by the licensees and/or their customers. While we expressed our belief in the Notice that services provided under such an approach would most likely meet the statutory criteria for auctions and that such an allocation would be economically beneficial to users and provide operators with incentives to develop and introduce innovative service features and technologies,[110] the benefits of this type of allocation extend beyond those services offered by commercial, subscriber based providers. If potential licensees indicate that the principal use of this spectrum will not involve receipt by the licensee of compensation from subscribers, thus making this spectrum not subject to auction, we maintain

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[106] We note that Broadcast Auxiliary services are not considered a Broadcasting service as defined in Section 2.1 of our Rules, 47 C.F.R. § 2.1. See also para. 53, infra.

[107] Comments of American Telecasting 4, Wireless Cable Association at 3-4, Wireless Holdings at 4-5, Leaco at 5, Pacific Bell Mobile at 1-2.

[108] American Telecasting states that eligibility should be limited to "those who already offer service to paying subscribers in the particular area."American Telecasting comments at 6. Leaco would permit rural telephone companies to obtain licenses in some instances without participating in a auction, subject to the rural telephone company paying an amount based on the average price paid for auctioned spectrum. Leaco comments at 5-9. Pacific Bell Mobile Systems merely requests that the Commission not prohibit use of this band for accommodation of fixed microwave systems that are displaced from the 1850-1990 MHz band by broadband PCS. Pacific Bell Mobile System comments at 2.

[109] UTC comments at 9-11.

[110] NPRM, 9 FCC Rcd. at 6780, para. 9.

that the underlying principles would continue to support an allocation to Fixed and Mobile services. Such an allocation thus will enable the greatest variety of services to be developed and used by the public.

49. Many commenters contend that the Commission may not allocate spectrum to both Fixed and Mobile services and use competitive bidding to assign licenses in that allocation because such action would violate the provisions of Section 309(j) of the Communications Act.[111] We disagree with commenters who suggest that the Commission has allocated spectrum to Fixed and Mobile services based on the impermissible purpose of raising funds for the United States Treasury through auctions.[112] We also disagree with commenters' arguments that our proposal to use competitive bidding in the NPRM alters spectrum allocation criteria and procedures established by the other provisions of the Communications Act.[113] Further, as explained supra, the Commission is afforded broad discretion in allocating spectrum in the public interest from Section 303 and other provisions of the Act. In this proceeding, we have decided to adopt an allocation to the Fixed and Mobile services. As we previously discussed, there is precedent for the Commission to employ an allocation to more than one service and provide a licensee great latitude as to how that spectrum is used, even before the Commission had auction authority.[114] Since both the statute and precedent provide adequate support to allocate frequency bands to both Fixed and Mobile services, we are able to conclude that we have not "alter[ed] spectrum allocation criteria and procedures established by the other provisions of [the] Act . . . ." The Commission's adoption of an allocation to the Fixed and Mobile Services is unrelated to our proposal to auction this allocation.

50. While we are proposing below to use auctions as an assignment mechanism based on our preliminary conclusion, based on the record, that services will likely meet the necessary criteria, we have also requested comment as to other services that might be provided under a Fixed and Mobile allocation.[115] If we determine that it is not reasonably likely that the principal use of this spectrum would meet the criteria for assigning licenses through auctions, or that it would better serve the public interest to provide some or all of this spectrum for non-subscriber-based Fixed and Mobile, including private services, it will be necessary to use an alternate assignment method.

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[111] See Comments of APCO at 2-3, AAR at 7, FIT at 3, TIA at 3-6, UTC at 7-8, Motorola at 15-17, and Winforum at 8.

[112] Comments of API at 13, APCO at 6, TIA at 4, UTC at 7, WinForum at 7, Compaq at 13, MSTV at 11, and Motorola at 15-17. 47 U.S.C. § 309(j)(7)(A).

[113] 47 U.S.C. § 309(j)(6)(A).

[114] See para. 45 supra. discussing allocation of spectrum for GPMS and for PCS.

[115] See para. 66, infra.

51. Traditional license assignment methods used to award licenses in mutually exclusive situations included random lotteries and comparative hearings. The Commission's authority to use random selection was generally limited by the Budget Act to situations where the Commission has determined that the principal use of the spectrum does not involve providing service to subscribers.[116] Therefore, if the Commission determines that the principal use of the spectrum is reasonably likely to involve service to subscribers, the Commission may assign licenses in mutually exclusive situations by using competitive bidding or comparative hearings. If the Commission determines that the principal use of the spectrum is not reasonably likely to involve service to subscribers, then we may assign licenses in mutually exclusive situations using previously established methods of random selection or comparative hearing.[117]

52. Some commenters claim that our proposal is inconsistent with our stated objective of providing competition in the provision of new services because different licensees could provide different services and would not, therefore, be in direct competition.[118] Other commenters argue against our proposal, claiming that customers must be ensured of a variety of services, and that the only way to ensure such variety is for the Commission to prescribe what services will be provided in each frequency band.[119] We believe that our proposal for a Fixed and Mobile allocation would provide for a variety of services and would result in competition. Given the wide variety of voice, data, and video services that have been or are now being developed, we believe that licensees will offer various services most demanded by consumers depending on the demographics of a specific area, technical restrictions on use of a specific band, and on existing services currently provided in an area. Licensees under such an allocation plan can be far more responsive to changing consumer demands than can the Commission. Offering licensees the opportunity to offer a wider variety of services, and to modify the types of services offered in response to changing customer demands, results in competition to provide the services most demanded by customers at prices that are deemed reasonable by the marketplace. This results in a much broader form of competition than just direct price competition for a strictly prescribed set of services.

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[116] 47 U.S.C. § 309(i)(1).

[117] The Commission will also need to determine the criteria for mutually exclusive applications. For instance, licenses may be mutually exclusive if accepted during a previously established "window" of time. Alternatively, we could accept applications on a first-come, first-served basis and only applications received on the same day would be considered mutually exclusive. In the case of many private services, we have established frequency coordination requirements to assist in the assignment process. See 47 C.F.R. § 90.175.

[118] In-Flight comments at 8-10.

[119] Comments of ITA at 5-6.

53. Regarding specific uses proposed by commenters, we are not persuaded by arguments that we have not sufficiently provided for accommodation of fixed microwave systems that will be displaced by PCS. This topic was the focus of much consideration in our proceeding identifying spectrum for emerging technologies and commenters have provided no substantive support to demonstrate that sufficient spectrum for relocation has not been identified. Further, reaccommodation of these fixed microwave systems requires paired channels. At this time, there is no other spectrum available that we could pair with 4660-4685 MHz. Several parties seek use of this spectrum for Broadcast Auxiliary services. While these commenters state that this spectrum is needed to support advanced television and to relieve congestion in the 1990-2110 MHz band, it also is possible that these entities could implement more spectrum efficient operations in the spectrum currently available for Broadcast Auxiliary. Moreover, we note that Broadcast Auxiliary services are permissible under a Fixed and Mobile allocation[120] and are not, therefore precluded from obtaining licenses under the allocation we have adopted for this band. Commenters have also suggested that this band be used to accommodate MSS feeder links. The issue of identifying and evaluating the viability of frequency bands for use by MSS feeder links is under consideration in our proceeding preparing for WRC-95, IC Docket No. 94-31.[121] We also note that the 25 megahertz of spectrum under consideration would not be sufficient, by itself, to satisfy the feeder link spectrum requirements for any of the MSS systems currently being proposed by potential MSS providers. Accordingly, we decline to adopt a specific allocation for this spectrum.

54. A number of entities support a Fixed and Mobile allocation for this band, expressing their desire to use the spectrum for such consumer oriented applications as interactive video, voice, and data.[122] Adoption of a Fixed and Mobile allocation for this band will allow licensees to provide a wide variety of applications based on public demand in any particular geographic area. While we anticipate that, under this Fixed and Mobile allocation, most applications provided will be commercial in nature, this allocation does not preclude use of the band for non-subscriber services and we will continue to develop the record in this proceeding to determine whether or not it is likely that the principal use of this spectrum will be for services that meet the statutory criteria for auctions. Considering the potential for providing a variety of applications in this band, we conclude that the allocation we are adopting in this Order will provide the greatest benefit to the public through the introduction of new applications and the enhancement of existing services.

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[120] See Table of Frequency Allocations, 47 C.F.R. § 2.106. A specific example is the entry for 1990-2110 MHz which is allocated for Fixed and Mobile use and is currently used for provision of Broadcast Auxiliary services, particularly for electronic news gathering.

[121] Preparation for International Union World Radiocommunication Conferences, Second Notice of Inquiry, IC Docket No. 94-31, FCC No. 95-36, released January 31, 1995.

[122] See comments of Leaco, WCA, Wireless Holdings, and American Telecasting.

2390-2400 MHz

55. Because we already have rules in place governing unlicensed PCS it is not necessary for us to seek additional comment on service rules.[123] There are, however, several issues with respect to use of this band that we do seek comment on. We note that the existing service rules effectively preclude operations that would combine 2390-2400 MHz with the adjacent 2400-2483.5 MHz band for use as a single, large Part 15 band. We request specific comment on whether some allowance should be made to accommodate operations that combine use of these bands. Commenters pursing combined use of these bands should provide recommendations on appropriate technical standards.

56. The National Research Council (NRC) and Cornell University have requested that aeronautical use of 2390-2400 MHz be specifically prohibited in order to protect space research operations that are conducted at 2380 MHz. In addition, NRC requests that terrestrial use of 2390-2400 MHz be prohibited within 100 miles of the National Astronomy and Ionospheric Center (NAIC) at Arecibo, Puerto Rico. We are sensitive to the need to protect important space research operations at 2380 MHz. We agree with regard to aeronautical use, and therefore we propose to specifically prohibit aeronautical use of unlicensed PCS devices operating at 2390-2400 MHz. However, the potentially nomadic nature of unlicensed PCS devices makes it difficult to effectively prevent use of these devices within a given distance of a particular site. We also believe that the relatively low power of these devices should provide sufficient protection to space research operations in all but the most unusual circumstances. Accordingly, we are not proposing to restrict use of unlicensed PCS devices in the vicinity of the NAIC. We request comment on whether our proposal provides reasonable protection to space research operations and, if not, what steps should be taken to provide greater protection.

57. Finally, as we stated above, we believe that unlicensed PCS and Amateur service use of 2390-2400 MHz will generally be compatible and that it is unnecessary to propose any formal standards for sharing between these services in this band.[124] We request comment on whether this is appropriate or whether there is a need to restrict certain uses by either the Amateur service or unlicensed PCS devices that might be particularly disruptive, or whether we should seek to implement for coordination of Amateur/PCS use. Commenters addressing this issue should be specific as to what uses might be particularly disruptive and as to how shared use of the band could be enhanced.

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[123] See para. 23, supra.

[124] See para. 17, supra.

2402-2417 MHz

58. Both the Amateur service and Part 15 devices operating at 2402-2417 MHz continue to be governed in accordance with current applicable technical and operational rules.[125] However, we seek comment on whether any changes should be made to our rules to facilitate use of this band by the Amateur service and Part 15 devices. Several commenters suggest increasing the status of Part 15 devices and one commenter, UTC, proposes that a Part 16 be created.

59. We note that NRC requests that, in order to protect space research operations, aeronautical use of 2402-2417 MHz be prohibited and that terrestrial use of devices at 2402-2417 MHz be prohibited within 30 miles of the NAIC.[126] Also, NRC expresses concern that harmonic emissions from 2412-2418 MHz may interfere with radio astronomy use of the 4825-4835 MHz band.[127] While we are currently maintaining the existing use of this band, we request comment on whether any of these restrictions should be implemented. Commenters addressing this issue should provide full support for their positions, including what effect such restrictions will have on the ability of Part 15 devices and the Amateur service to use this band.

4660-4685 MHz

A. Service Rules

1. General Wireless Communications Service

60. We propose to create a new service for licensing of the 4660-4685 MHz band. This new service, which would be included in a new Part of the Commission's Rules, would allow a licensee to provide any Fixed or Mobile service, consistent with the allocation for this band and our proposed rules described below. We propose to name this new service the General Wireless Communications Service (GWCS). We believe that this proposal will provide licensees a sufficient opportunity to meet the spectrum needs of consumers. For example, licensees could use this spectrum for dispatch service, point-to-point microwave, aeronautical audio/visual service, wireless local loop services, and terrestrial fixed and mobile auxiliary broadcast operations. As we have noted, Broadcast services, Radiolocation services,

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[125] UTC comments at 15, Motorola comments at 10-14, Metricom comments at 13-14.

[126] NRC comments at 7.

[127] NRC comments at footnote 10.

and Satellite services (including the Mobile Satellite Service) would not be included in the General Wireless Communications Services category.[128] We seek comment on this proposal.

61. We note that in addition to the Fixed and Mobile allocation we have adopted in the First Report and Order, 4660-4685 MHz is allocated on co-primary basis for non-government fixed-satellite service (FSS) space-to-Earth links with use limited to international inter-continental systems and subject to a case-by-case electromagnetic analysis in accordance with US footnote 245 of the Table of Frequency Allocations. In the NOI in this proceeding we requested comment on the necessity of maintaining the US245 restrictions on FSS use of this band, considering that it would no longer be available for Federal Government use.[129] We received no comments addressing this issue. To facilitate the shared use of this band, we propose to maintain the restrictions set forth in US footnote 245 on use of 4660-4685 MHz. We request comment on this proposal. Commenters that support eliminating the restriction should fully describe how FSS service use would be compatible with Fixed and Mobile GWCS services .

2. Designation of Specific Services

62. Although we are proposing to establish a new service classification for the intended purpose of enhancing the ability of service providers to meet a variety of user needs, we also acknowledge the possibility of better accommodating these needs by prescribing rules that provide for utilization of the 4660-4685 MHz frequency band only by specific services. We seek comment on such an alternative approach.

63. Interested parties who oppose our proposed establishment of a GWCS category should suggest various ways in which use of the 4660-4685 band could be limited to specific services. For example, we seek comment on (1) what services should be treated as eligible, in connection with our assignment of channels in the band; (2) whether we should divide channels in the band in a manner which assigns Fixed services exclusively to certain channels and Mobile services exclusively to remaining channels in the band; (3) whether we should establish priorities for Fixed service or Mobile service use of some or all of the channels established in the band; and (4) whether we should assign some or all channels established in the band for exclusive use by private Fixed or Mobile Services. Proponents of this alternative approach for designating services in the 4660-4685 MHz frequency band should provide facts and arguments supporting their view that such an approach will better serve the Commission's objectives and the public interest than would the establishment of a General Wireless Communications Service that would permit use for these and additional applications.

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[128] See para. 46, supra.

[129] NOI, 9 FCC Rcd at 2177, n. 23.

B. Use of Spectrum

64. As discussed above, we believe that our proposed General Wireless Communication Service will benefit the public by providing licensees the opportunity to use the spectrum as they find appropriate. We tentatively conclude that it is likely that these uses will principally involve the provision of subscriber-based services, thus enabling us to propose competitive bidding as the assignment method for this spectrum.[130] Section 309(j)(2)(A) of the Communications Act provides that competitive bidding may be used by the Commission to assign spectrum if the "principal use" of the spectrum involves, or is reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation.[131] In the Competitive Bidding Second Report and Order, we established a general framework for evaluating whether particular service classifications can be considered to be used principally for the provision of subscriber-based services, and we seek comment regarding whether that general framework should be used with regard to the assignment of spectrum in the 4660-4685 MHz band.[132]

65. In the Competitive Bidding Second Report and Order, we concluded that we will determine principal use by comparing the amount of non-subscription use made by the licensees in a service as a class with the amount of subscriber-based use "on the basis of information throughput, time, or spectrum."[133] We found that the competitive bidding assignment method is permissible if "at least a majority of the use of a Commission regulated service or class of service [is] for service to subscribers for compensation."[134] In arriving at this approach, we rejected the notion that we must examine individual applications to determine each licensee's intended use of the spectrum.

66. Given the record before us, we believe that it is reasonable to conclude that the principal use of this spectrum under our proposed General Wireless Communications Service

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[130] See paras. 68-69, infra.

[131] See 47 U.S.C. § 309(j)(2)(A). See also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2353 para. 30, (1994) (Competitive Bidding Second Report and Order), recon., Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) (Competitive Bidding Reconsideration Order).

[132] See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2353-54, paras. 30-36.

[133] Id. at 2354, para. 32. Given the fact that "there is no way to anticipate . . . all of the possible uses of the electromagnetic spectrum", we explicitly retained the ability to use any of these measurement criteria in evaluating particular service classifications. Id. at n.21.

[134] Id. at 2354, para. 32.

will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals. As we have described, a number of commenters state that they seek use of this spectrum for such subscriber based services, including for interactive wireless cable and other wireless data, voice, and interactive services.[135] A number of commenters, however, propose uses of this spectrum, such as for private or broadcast auxiliary services, that would not be subscriber-based. Accordingly, while we believe that it is reasonably likely that the principal use of this spectrum under our proposed General Wireless Communications Service will be for subscriber based services, we request further comment on this tentative conclusion. Commenters addressing this issue should fully describe the service that they contemplate for the spectrum, whether the service would be Fixed or Mobile, and whether it would be private (for a licensee's internal use), commercial (subscriber-based), or non-common carriage but subscriber-based.

67. To help us make an accurate determination regarding the extent to which this spectrum will be used for subscriber-based services, we request that commenters describe their spectrum needs and provide an indication of the degree of competition expected within a particular geographic service area. Commenters should also describe as accurately as possible the types of geographic areas in which they anticipate operating in (e.g., rural, urban, top 50 markets), since the likelihood of subscriber use may vary among geographic areas.

C. Assignment Methods

1. Competitive Bidding

68. Sections 309(j)(1) and 309(j)(2) of the Communications Act[136] permits auctions where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals.[137] As we stated in the preceding section, we believe that the principal use of this spectrum will meet

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[135] See para. 40, supra. In addition it is unclear at this time whether AAVS, which In-Flight, in its January 24, 1995, Ex Parte filing, states can be provided at 4660-4685 MHz, would be considered a subscriber based service. In its Ex Parte filing, In-Flight merely states that "it is likely that AAVS will be largely advertiser supported." In-Flight Ex Parte filing at footnote 2. This appears to suggest that there will be at least some subscriber support for this service.

[136] 47 U.S.C. §§ 309(j)(1), 309(j)(2).

[137] For a discussion of our preliminary assumptions regarding the principal use of this spectrum, see paras. 64-67, supra.

these requirements.[138] In addition, Section 309(j)(2)(B) requires the Commission, before it may adopt the use of auctions to award licenses, to determine that use of competitive bidding will promote the objectives described in Sections 1 and 309(j)(3) of the Communications Act. We tentatively conclude that the use of competitive bidding to assign licenses in the 4660-4685 MHz band will promote these objectives. We believe that auctioning licenses in this band will lead to more speedy initiation of services than would use of comparative hearings, and that auctions will place licenses in the hands of those who value the spectrum most highly. Thus, competitive bidding will promote the availability, to all the people of the United States, of a rapid, efficient, nationwide, and worldwide telecommunications system with adequate facilities at reasonable charges, satisfying the objectives of Section 1 of the Communications Act.

69. Section 309(j)(3) of the Communications Act sets forth Congress's four objectives for competitive bidding, as follows:[139]

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
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> (C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
>
> (D) efficient and intensive use of the electromagnetic spectrum.

We tentatively conclude that using a system of competitive bidding for assignments in the 4660-4685 MHz band will promote these four objectives. First, our experience with the auction program being used to award licenses to provide both narrowband and broadband PCS leads us to believe that auctions will, more quickly than other licensing schemes, lead to the development and rapid deployment of new technologies, products and services, thus satisfying the objective expressed in Section 309(j)(3)(A). Second, we believe that, with the benefit of the comments solicited below with respect to the treatment of "designated entities," we will be able to adopt competitive bidding rules that will advance the objectives of Section

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[138] See para. 66, supra.

[139] See 47 C.F.R § 309(j)(3).

309(j)(3)(B) relating to the promotion of economic opportunity and the dissemination of licenses among a wide variety of applicants. Third, use of auctions to assign 4660-4685 MHz band licenses will clearly advance the goals of Section 309(j)(3)(C) by enabling us to recover for the public a portion of the value of the public spectrum and avoid problems of unjust enrichment.[140] Finally, as we stated in the Competitive Bidding Second Report and Order, auctions tend "to reinforce the desire of licensees to make efficient and intensive use of . . . spectrum. Auctions make explicit what others are willing to pay to use the spectrum, and the licensees' need to recoup the out-of-pocket expenditure for a license should provide additional motivation to get the most value out of the spectrum."[141] As noted above, we anticipate that any system of competitive bidding we adopt would be designed to lead to the assignment of licenses to those parties who value the licenses most highly and who thus can be expected to make efficient and intensive use of the spectrum, as contemplated by Section 309(j)(3)(D). In light of the foregoing, we tentatively conclude that competitive bidding should be used to award licenses in the 4660-3685 MHz band in the new General Wireless Communications Service if mutually exclusive applications are filed. We request comment regarding this tentative conclusion.

2. Other Assignment Methods

70. Although we are proposing the use of a system of competitive bidding to assign licenses for the General Wireless Communications Service in the 4660-4685 MHz band, we also seek comment regarding whether we should utilize a different assignment method.[142]

a. Spectrum Principally Used for Subscriber-Based Services

71. If the principal use of spectrum in the band is reasonably likely to involve subscriber-based services, then we have the discretion to use a system of competitive bidding to assign licenses in the band if we determine that auctions will promote the objectives delineated in the Communications Act.[143] If we determine, in a case in which the principal use of spectrum in the band is reasonably likely to involve subscriber-based services, that those objectives would not be promoted by the use of a system of competitive bidding, then our only alternative is to use comparative hearings as a means of assigning all licenses in the band.

72. Thus, parties favoring the use of comparative hearings as the method for licensing subscriber-based services should address these issues in their comments. First, commenters

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[140] See also para. 98, infra (proposed regulatory safeguards to prevent unjust enrichment).

[141] Competitive Bidding Second Report and Order, 9 FCC Rcd 2358, para. 58.

[142] See, e.g., 47 C.F.R. §§ 1.972, 1.973, 22.131(c)(1).

[143] See 47 U.S.C. §§ 151, 309(j)(3).

should address the soundness of our tentative conclusion that use of competitive bidding in this instance will promote the objectives established in the Communications Act. Commenters should present arguments, for example, illustrating the manner in which the use of competitive bidding would fail to promote the development and rapid deployment of new technologies and services, would fail to enhance economic opportunity and competition, or would be deficient in promoting efficient and intensive use of the public spectrum. In addition, commenters may present arguments regarding comparative hearings as a mechanism for ensuring the rapid deployment of new technologies and services[144] and for recovering "for the public . . . a portion of the value of the public spectrum resource made available for commercial use . . . ."[145] If such comments lead us to conclude that our tentative conclusions regarding the extent to which competitive bidding promotes the objectives of the Act are not sound, then we will prescribe comparative hearings as the method for assigning licenses in the 4660-4685 MHz band. However, our tentative decision to use a system of competitive bidding to assign licenses in the 4660-4685 MHz band reflects our view that comparative hearings would not be an effective method for this purpose, in part because our "experience with comparative hearings has shown they usually are prolonged."[146] Further, "[a]s a general matter . . . we are reluctant to substitute our judgment for the wisdom of the marketplace by dictating outcomes based on assessment of the relative merits of applicants' service proposals."[147] We seek comment on these tentative views.

b. Spectrum Not Principally Used for Subscriber-Based Services

73. The Communications Act provides that the Commission has the discretion to use a system of random selection to grant licenses involving a use of the spectrum in cases of mutually exclusive applications if the Commission has determined that the principal use of the spectrum will not involve subscriber-based services.[148] Alternatively, the Commission could employ comparative hearings to grant licenses in such cases.

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[144] See 47 U.S.C. § 309(j)(3)(A).

[145] See 47 U.S.C. § 309(j)(3)(C).

[146] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, Notice of Proposed Rulemaking, CC Docket No. 92-166, 9 FCC Rcd 1094, 1114, para. 40 (1994) (MSS Notice).

[147] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, Report and Order, CC Docket No. 92-166, FCC 94-261, at para. 66, released Oct. 14, 1994 (MSS Report and Order).

[148] See 47 U.S.C. § 309(i).

74. As indicated in our previous discussion, we have reached the tentative view that, based on the record thus far established in this proceeding, it is reasonable to conclude that the principal use of spectrum in the proposed General Wireless Communications Service will involve or is reasonably likely to involve the receipt by licensees of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals. If, however, the pleadings in response to this Notice demonstrate that there is not a reasonable basis for expecting that the principal use of the spectrum will be for subscriber-based services, then we must determine whether to employ lotteries or comparative hearings as the assignment method for licenses in the band.

75. We tentatively conclude that, if we determine that the principal use of the proposed General Wireless Communications Service or other service in the 4660-4685 MHz band will not be for subscriber-based services, then the public interest will be better served through the use of a random selection method to assign licenses in the band. It is our tentative view that a lottery system would be preferable to comparative hearings because it would expedite the grant of licenses and would be capable of resulting in the provision of adequate service to users.[149] If a system of random selection is used to award licenses in the 4660-4685 frequency band, we propose to implement this system in essentially the same manner as the framework we are proposing in this Notice for a system of competitive bidding.[150] That is, the rules we propose for channelization and aggregation of frequency blocks, for license areas, and for applicant eligibility in the case of a system of random selection are the same as in the case of auctions. We seek comment on this proposed general

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[149] See MSS Notice, 9 FCC Rcd at 1118, para. 46. In assessing the relative merits of lotteries and comparative hearings for granting licenses for public mobile services and certain other services, we have found that a system of random selection is preferable:

> Although this Commission is always chary of imposing new regulations on the communications industry, we believe in this case that the benefits of the lottery regulations far outweigh their costs. Lotteries will help speed provision of service to the public by eliminating the costly and time consuming comparative hearings while still maintaining some relative advantage for minorities and others underrepresented in the ownership of mass media facilities. The Commission holds great hope for lotteries . . . .

Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Second Report and Order, 93 FCC 2d 952, 997, para. 131 (1983), recon. denied, 49 Fed. Reg. 49466 (Dec. 20, 1984).

[150] See paras. 77-83, infra.

framework. We also seek comment on specific procedural rules we might establish for lotteries.[151]

3. Mutual Exclusivity

76. One important aspect of any assignment method is determining whether applications are mutually exclusive. The Communications Act states that "[n]othing in [Section 309(j)], or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings . . . ."[152] We propose to use a 30-day filing window or other application cut-off method to allow for competing initial applications.[153] Because the 4660-4685 MHz band is currently unlicensed and the Commission has proposed to use defined service areas for each license, we need not be concerned at this time about situations where an application to modify a station authorization is mutually exclusive with an initial license application. We seek comment on this proposal, particularly whether some other type of filing group would be more appropriate for determining whether initial applications are mutually exclusive. For example, with private services, in particular, the Commission has often attempted to reduce the possibility of mutual exclusivity between initial applicants by adopting "first come, first served" procedures[154] and utilizing frequency coordinators.[155]

D. Channelization; Aggregation

77. We propose that the 4660-4685 MHz band be licensed in five blocks, each of which would be 5 megahertz wide. Many of the subscriber based uses discussed by commenters for this band, such as interactive video, voice, and data, as well as non-subscriber based uses such as auxiliary broadcast or private services, require relatively wide bandwidth. In order to provide licensees as much opportunity as possible to obtain the amount of spectrum they need to offer their particular service, we propose to permit licensees to obtain multiple 5 megahertz blocks. Based on available information about the likely services to be provided in this band, we tentatively conclude that no licensee would need more than 15 megahertz in a single market area. Therefore, we propose to limit a single entity from obtaining more than three of these blocks in a single geographic licensing area. We request

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[151] See, e.g., 47 C.F.R. §§ 1.821-1.825, 1.972, 1.1601-1.1603.

[152] 47 U.S.C. § 309(j)(6)(E).

[153] See, e.g., 47 C.F.R. § 22.131.

[154] See, e.g., 47 C.F.R. § 1.953.

[155] See, e.g., 47 C.F.R. § 90.175.

comment on this proposal and whether an alternative channelization plan might be more beneficial. Commenters should provide the specifics of any alternative channelization plan if they believe an alternative plan is appropriate and should provide full support for their views. In particular, interested parties who have advocated particular applications for the 4660-4685 MHz frequency band, in earlier comment rounds in this proceeding, are invited to present facts and arguments supporting channelization plans that may be more conducive to the service applications they favor.

78. We also propose that, regardless of the specific service to be provided, this spectrum will not count against the 45 MHz spectrum cap that applies to certain commercial mobile radio service (CMRS) licensees.[156] We propose this for two reasons. First, this band is at a substantially higher frequency than any currently available mobile radio system. As a result, it is unlikely that off-the-shelf equipment to provide services competitive with CMRS services will be available for use in this band within the next few years. Second, unlike all other allocations for two-way CMRS services, this allocation is for a single, unpaired frequency band. Although it may be possible in the future to provide a CMRS service that is competitive with existing or planned CMRS services on unpaired spectrum, we do not believe that this will be feasible in the near future. Consequently, until it is feasible to offer services competitive with existing and planned CMRS services on this new band, we believe it would be premature to include spectrum assignments in this band toward the spectrum cap adopted in the CMRS proceeding. We request comment on this proposal.

E. License Area

79. Under our Fixed and Mobile allocation, we propose that all licenses issued be based on Major Trading Areas (MTA).[157] Because we have adopted an allocation that allows

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[156] Implementation of Section 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, Third Report and Order, GN Docket No. 93-252, 9 FCC Rcd 7988, 8109-10, para. 263 (1994), recon. pending (The spectrum cap currently applies to personal communications services, specialized mobile radio services, and cellular services.).

[157] MTAs are defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide 36-39 (123d ed. 1992). There are 47 MTAs, as defined by Rand McNally. Following the approach we have taken with regard to other services in which we have used MTA license areas, we propose to separate Alaska from the Seattle, Washington, MTA so that Alaska would be licensed as a separate MTA-like area. We also propose to license separately the following additional MTA-like areas:

(1) Guam and the Northern Mariana Islands.

(2) Puerto Rico and the United States Virgin Islands.

for use of the spectrum by any Fixed or Mobile service, we cannot determine the most appropriate size of the service area based on the type of service to be offered. Therefore, we believe that it is important to balance our desire to provide areas small enough to deploy niche services, or services aimed at rural or relatively rural areas, while providing a large enough area for those licensees that wish to provide wide-area or regional service. We tentatively conclude that MTAs provide the best compromise in this situation. We do not propose to restrict the number of MTAs in which a party may obtain a license. Thus, a licensee may aggregate licenses to offer a regional or nationwide service.

80. On the other hand, because the MTA may be too large for some licensees, we propose to permit licensees to lease the rights to operate a general wireless communication system within portions of their authorized geographic service area or transfer a portion of their license to geographically partition their service area, allowing another party to be licensed in the partitioned area. Of course, such a transfer would be subject to Commission approval as required by the Communications Act[158] We request comment on these proposals. In particular, we request that commenters address specific procedures for leasing or partitioning a geographic area. For example, should the Commission use partitioning procedures similar to those used for cellular licenses and adopted for broadband PCS licenses? Should the Commission develop leasing procedures similar to those we use for FM subcarriage? Entities that believe that licensing should be based on areas other than MTAs should fully support their alternative proposal.

81. If we determine that a mix of subscriber, non-subscriber, and private- based services is likely in the 4660-4685 MHz band, we may issue licenses based on different geographic regions for different portions of the bands or for different areas of the Nation.

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(3) American Samoa.

Thus, we propose to license a total of 51 MTA or MTA-like areas on each spectrum block. We note that Rand McNally & Company owns the copyright to Major Trading Area and Basic Trading Area Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally's Commercial Atlas & Marketing Guide. The Personal Communications Industry Association and Rand McNally have recently entered into an agreement regarding the use of Rand McNally's market area designations (i.e., Basic Trading Areas and Major Trading Areas) for the licensing of various mobile radio services. Services in the millimeter wave spectrum in the 4660-4685 MHz frequency band are not covered by this agreement. The listings of the Major Trading Areas, including the counties, parishes, and census divisions that comprise each MTA, are available for public inspection in the Office of Engineering and Technology's Technical Information Center, 2nd Floor, 2000 M Street, N.W., Washington, D.C.

[158] 47 U.S.C. § 310(d).

For example, we could issue MTA licensees for 4660-4675 MHz and issue BTA licenses for 4675-4685 MHz, or we could issue MTA licenses in highly populated areas such as the Northeast and Southern California where subscriber based services may be more likely to be offered and BTA licenses in all other geographic areas. We seek comment on these alternative service area proposals.

82. Commenters that seek spectrum for non-subscriber based services should address the issue of whether we should allow licensees to sell or lease their excess capacity. We propose that licensees offering non-subscriber based services not be permitted to lease or transfer control of any part of its license for at least 5 years from the date the license is granted. Also, because non-subscriber-based entities might obtain potentially valuable licenses for free if a system of competitive bidding is not used, to ensure that such entities do not acquire such spectrum for speculative purposes, we propose that a licensee offering a non-subscriber based service not be permitted to lease excess capacity for at least 5 years after initial authorization.[159] We believe that such a requirement will help protect against speculators obtaining licenses. In addition, we propose that, if we determine that a licensee is providing a subscriber based service under a license issued under the presumption that the service to be provided was non-subscriber based, the license would be immediately forfeited. Alternatively, we request comment on whether such a licensee should be made to pay the U.S. Treasury an amount of money based on the auction price of a comparable license. Commenters supporting the latter approach should provide as much detail as possible as to how the value of the license should be determined and whether payment should include some unjust enrichment payment[160] (e.g., the value of the license plus 10 percent).

F. Eligibility

83. If we determine that it is reasonably likely that the services to be provided will be commercial services, we propose no restrictions on eligibility to apply for licenses in this band other than those foreign ownership restrictions that apply to CMRS and common carrier fixed system licensees,[161] and the restriction on foreign governments or their representatives related to the holding of private mobile radio service licenses.[162] Although rural telephone companies would be eligible, we do not propose to treat them differently than other applicants. Thus, we will not allow rural telephone companies to obtain licenses without

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[159] See 47 C.F.R. § 90.733(d).

[160] See 47 U.S.C. §§ 309(i)(4)(C), 309(j)(4)(E).

[161] 47 U.S.C. § 310(b).

[162] 47 U.S.C. § 310(a).

participating in an auction, as suggested by Leaco.[163] We seek comment on these proposals. We also request that commenters seeking spectrum for non-commercial services provide as complete information as possible regarding eligibility restriction that should apply.

G. Competitive Bidding Issues

84. We have proposed that, to the extent that we determine that it is reasonably likely that some or all of the 4660-4685 MHz band will be used for services that meet the criteria for issuing licenses pursuant to auctions, we will use auctions to issue licenses. Accordingly, we wish to fully explore issues related to competitive bidding.

1. Competitive Bidding Design

a. General Competitive Bidding Principles

85. The Competitive Bidding Second Report and Order, as modified by the Competitive Bidding Reconsideration Order, established the criteria to be used in selecting which auction design method to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly will foster Congress' policy objectives. In this regard, we noted that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum.[164]

86. Based on the foregoing, we concluded that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.[165] We also noted, however, that simultaneous multiple round auctions may not be appropriate for all licenses.

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[163] Leaco comments at 7-9. We note that we have already taken significant steps to help rural telephone companies obtain PCS spectrum, including increasing from 20 percent to 40 percent the cellular attribution threshold for rural telephone companies with non-controlling cellular interests in their service areas and allowing broadband PCS licenses to be geographically partitioned. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, PP Docket No. 99-253, 9 FCC Rcd 5532, 5597-99, paras. 148-153 (1994) (Competitive Bidding Fifth Report and Order), recon., Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858 (Competitive Bidding Fourth Memorandum Opinion and Order), Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994) (Competitive Bidding Fifth Memorandum Opinion and Order).

[164] See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2360-61, para. 70.

[165] See id. at 2367, paras. 109-111.

For example, where there is less interdependence among licenses, there is less benefit to auctioning them simultaneously. Similarly, we explained that when the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may consider auction designs that are relatively simple, with low administrative costs and minimal costs to the auction participants.[166]

b. Competitive Bidding Methodology for Licenses in the 4660-4685 MHz Band

87. We believe that simultaneous multiple round bidding should be the preferred method for licensing of the proposed 5 MHz-wide MTA spectrum blocks. Based on the record in this proceeding and our experience with the auctioning of other licenses, we expect the proposed licenses to be of sufficient value to warrant the use of simultaneous auctions. We further believe that the value of these MTA licenses for certain contemplated uses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions. Simultaneous multiple round bidding will allow bidders to express the value of the interdependency among licenses better than if licenses are auctioned separately. Moreover, simultaneous multiple round bidding will provide bidders with the opportunity to pursue back-up strategies that enable them most efficiently to obtain the license combinations which satisfy their service needs. Therefore, we tentatively conclude that simultaneous multiple round bidding is most likely to award MTA licenses to bidders who value them the most highly and who are most likely to deploy new technologies and services rapidly. We ask commenters to address this tentative conclusion and whether any other competitive bidding designs might be more appropriate for the licensing of this spectrum, particularly if the number of mutually exclusive applications actually received for the individual MTA blocks suggests that the blocks are not substantially interdependent.

88. Assuming we use simultaneous multiple round auctions for these licenses, we also seek comment on which blocks should be auctioned together, the intervals between rounds in each auction, and the sequencing of each auction. The importance of the choice of license groupings increases with the degree of interdependence among the individual licenses or groups of licenses to be auctioned. Grouping interdependent licenses together and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them the most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of an auction. Based on these principles, our tentative view is that all 255 licenses (51 MTA licenses on each of 5 spectrum blocks) should be auctioned simultaneously because of the relatively high value and significant interdependence of the licenses. We seek comment on this tentative analysis and on possible alternatives for grouping of licenses.

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[166] See id. at 2367, paras. 112-113.

c. *Combinatorial Bidding*

89. Combinatorial bidding is an auction method which allows bidders to bid for multiple licenses as all-or-nothing packages, e.g., all licenses nationwide on a particular spectrum block, with the licenses awarded as a package if the combinatorial bid is greater than the sum of the high bids on the individual licenses in the package. The advantages and disadvantages of combinatorial bidding were carefully analyzed in the Competitive Bidding Second Report and Order.[167] We indicated particular concern about the complexity and cost of combinatorial bidding and the potential of such auctions to award licenses in combinations even though they may be of greater value if awarded separately. Thus, while recognizing the potential benefits of combinatorial bidding in facilitating aggregations, we concluded that much of that same benefit could be obtained through the use of simultaneous auctions without the complexity and potential distortions of combinatorial bidding. We stated that we did not then plan to use combinatorial bidding in simultaneous multiple round auctions, such as we are proposing here. Nevertheless, we also recognized that the Congressional mandate in Section 309(j)(3) of the Communications Act implies that we should periodically reevaluate the efficiency of auction designs and, where appropriate, test alterative methodologies.[168] For reasons that we will explain below, we believe that it may be appropriate to allow bidders to submit combinatorial bids for nationwide aggregations of MTA licenses in the 4660-4685 MHz band. We request comment on whether to allow combinatorial bidding for this band and ask commenters to address the specific options described below.

90. For some of the services proposed in the comments in this proceeding (e.g., air/ground and MSS feeder links), it may be necessary or at least highly desirable that spectrum used in such applications be licensed to the same entity nationwide. While geographic aggregation is generally facilitated in a simultaneous auction, a business plan that depends critically on winning every MTA license on a particular block nationwide may be at a disadvantage absent combinatorial bidding even if it represents the highest valued use of the spectrum. This problem could arise because of the increased risk a bidder attempting to aggregate nationwide may face if the total price of the aggregation rose above its value to that bidder, but the bidder is not outbid on all its high bids so it is forced either to withdraw its remaining high bids late in the auction and possibly incur a bid withdrawal penalty or pay too much for the remaining licenses that do not provide complete nationwide coverage. Increased risk could discourage nationwide bidders from fully expressing the value of nationwide aggregations, causing the spectrum ultimately to go to lower valued uses.

91. One way to overcome this difficulty would be to allow the submission of nationwide combinatorial bids for all MTA licenses on the same spectrum blocks. By limiting combinatorial bids to nationwide aggregations, we would reduce the complexity

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[167] Id. at 2366-67, paras. 98-115.

[168] 47 U.S.C. § 309(j)(3).

concern about unlimited combinatorial bidding that we expressed in the Second Report and Order. However, there is still the concern, also expressed in the Second Report and Order, that the auction results could be biased in favor of nationwide aggregations under this approach. An inefficient outcome could occur if a combinatorial bid exceeded the sum of individual MTA high bids and the MTA bidders, individually acting as "free riders," were unable collectively to raise their total bid above the combinatorial bid even though they collectively valued the licenses more highly. This might happen if some MTA bidders did not increase their bids on the expectation that others in the group would increase their bids sufficiently to beat the combinatorial bid. A possible method of addressing the free rider problem would be to set bid increments on individual licenses so as to proportionally allocate any gap between the sum of the highest individual bids and the highest combinatorial bid in a round. For example, if the sum of the highest individual bids were $100 and the highest combinatorial bid were $110, the minimum bid increment on individual licenses would be 10 percent of the previous high bid. A potential difficulty with this approach is that it may set the minimum bid price on certain individual licenses above the maximum amount any bidder is willing to pay, although the sum of the maximum amount bidders are willing to pay for licenses individually exceeds the greatest amount any bidder is willing to pay for all the licenses as a group. Another way to address the free rider problem would be to establish a bidding premium for the combinatorial bid. For example, for a nationwide bid to be accepted, it must be at least 5 percent more than the sum of the individual bids. The bidding premium could be used either in conjunction with the proportional bid increment approach or separately. We seek comment on these proposals for the use of combinatorial bidding in the 4660-4685 MHz band.

92. Other auction designs might also be used to facilitate combinatorial bidding. One approach would be an "Electronic Interactive Combinatorial Auction" (EICA) using the "Adaptive User Selection Mechanism" (AUSM) as developed by Banks, Ledyard and Porter and proposed by NTIA.[169] In a laboratory setting the stand-by queue in the AUSM mechanism has been an effective mechanism for enabling bidders for individual items or smaller packages to coordinate bids against bidders for larger packages. Although the stand-by-queue facilitates coordination it does not solve the free rider problem in theory, and the laboratory results may not generalize to FCC auctions where bidders have employed leading game theorists to exploit the rules. We request comment on the feasibility of using this type of auction design. In particular, commenters should address whether the use of such an auction design may violate our collusion rules.[170]

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[169] J.S. Banks, J.O. Ledyard, and D.P. Porter, "Allocating Uncertain and Unresponsive Resources: An Experimental Approach," 20 RAND JOURNAL OF ECONOMICS 1-22 (1989). Ex parte submission of NTIA, February 28, 1994. See also Competitive Bidding Second Report and Order, 9 FCC Rcd at 2365-66, paras. 99-105.

[170] See para. 100, infra.

d. Bidding Procedures

93. We also seek comment on bidding procedures to be used in the 4660-4685 MHz auctions, including bid increments, duration of bidding rounds, stopping rules, and activity rules. Assuming that we use simultaneous multiple round auctions, we generally propose to use the same or similar bidding procedures to those used in simultaneous multiple round bidding for MTA-based PCS licenses.[171] We seek comment, however, on whether any variations on these procedures should be adopted for licenses in the 4660-4685 MHz band.

2. Procedural, Payment, and Penalty Issues

94. In the Competitive Bidding Second Report and Order, as modified by the Competitive Bidding Reconsideration Order, the Commission established general procedural, payment, and penalty rules for auctions, but also stated that such rules may be modified on a service-specific basis.[172] As discussed below, we generally propose to follow the procedural, payment, and penalty rules established in Subpart Q of Part 1 of the Commission's Rules,[173] but seek comment on whether any service-specific modifications of these rules are needed based on the particular characteristics of the 4660-4685 MHz band licenses.

a. Upfront Payments

95. As in the case of other auctionable services, we propose to require participants in the 4660-4685 MHz auction to tender to the Commission in advance of the auction, a substantial upfront payment as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the penalty (discussed infra) in the event of bid withdrawal or default. We seek comment on whether the standard upfront payment formula of $0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding is appropriate for these licenses. We also seek comment on the appropriate minimum upfront payment for applications. In the Competitive Bidding Second Report and Order, we established a minimum upfront payment of $2,500, but we also indicated that the minimum amount could be modified on a service-specific basis.[174] We seek comment on whether the standard or some alternative amount is appropriate for the licenses in the 4660-4685 MHz band.

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[171] See, e.g., Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5541-56, recon., Competitive Bidding Fourth Memorandum Opinion and Order, 9 FCC Rcd at 6859-6864.

[172] See Competitive Bidding Reconsideration Order, 9 FCC Rcd at 7249-50, paras. 23-26.

[173] 47 C.F.R Part 1, Subpart Q.

[174] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2379, para. 180.

b. Down Payment and Full Payment for Licenses Awarded by Competitive Bidding

96. The Competitive Bidding Second Report and Order generally required successful bidders to tender a 20 percent down payment on their bids to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.[175] We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth and diminish access. We therefore propose to require that winning bidders for 4660-4685 MHz licenses supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). We seek comment on whether this is an appropriate requirement for licensing of this service, and whether 20 percent represents an appropriate level of payment. In addition, we ask commenters to address whether any special provisions, for example a reduced down payment, should be adopted for designated entities, and if so, for which specific categories of designated entities and why.[176]

c. Bid Withdrawal, Default, and Disqualification

97. We propose to adopt bid withdrawal, default, and disqualification rules for 4660-4685 MHz licensing based on the procedures established in our general competitive bidding rules. Under these procedures, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed, or defaults by failing to remit the required down payment within the prescribed time, would be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if the subsequent winning bid is lower. A defaulting auction winner would be assessed an additional penalty of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. In the event that an auction winner defaults or is otherwise disqualified, we propose to re-auction the license either to existing or new applicants. The Commission would retain discretion, however, to offer the license to the next highest bidder at its final bid level if the default occurs within five business days of the close of bidding. We seek comment on these proposed procedures.

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[175] Id. at 2381-82, paras. 190-192.

[176] See paras. 101-115, infra.

3. Regulatory Safeguards

a. Unjust Enrichment Provisions

98. The Budget Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." We therefore propose to adopt the transfer disclosure requirements contained in Section 1.2111(a) of our rules for all 4660-4685 MHz licenses obtained through the competitive bidding process. In addition, we propose specific rules governing unjust enrichment by designated entities, which are discussed below. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. We seek comment on these proposals.

b. Performance Requirements

99. The Budget Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[177] In the Competitive Bidding Second Report and Order, we decided that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. Our proposed 4660-4685 MHz service rules contain specific performance requirements, such as the requirement to construct and provide service within a specific period of time. Thus, we do not propose to adopt any additional performance requirements for competitive bidding purposes. We seek comment on this proposal.

c. Rules Prohibiting Collusion

100. In the Competitive Bidding docket, we adopted special rules prohibiting collusive conduct in the context of competitive bidding.[178] We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially the largest

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[177] 47 U.S.C. § 309(j)(4)(B).

[178] 47 C.F.R. § 1.2105(c). Competitive Bidding Second Report and Order, 9 FCC Rcd 2386-88, paras. 221-226; Competitive Bidding Reconsideration Order, 9 FCC Rcd at 7254, paras. 50-53; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Memorandum Opinion and Order, PP Docket 93-253, 9 FCC Rcd 7684, 7687-89, paras. 8-12 (1994).

firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. We propose to apply these rules to the 4660-4685 MHz service. Under these procedures, bidders will be required to identify on their applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships, or other agreements or understandings that relate to the competitive bidding process. Bidders will also be required to certify that they have not entered into any explicit or implicit agreements, arrangements, or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. We seek comment on the proposal to continue to implement our rules prohibiting collusive conduct. Specifically, commenters should address whether any procedures for combinatorial bidding would necessitate changes in our rules prohibiting collusive conduct.[179]

4. Treatment of Designated Entities

a. Introduction

101. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[180] The statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal.[181] In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." Finally, Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules including installment payments.

102. In the Competitive Bidding docket, we established eligibility criteria and general rules that would govern the award of special provisions for small businesses, rural telephone companies, and minority- and women-owned businesses (collectively, "designated entities"). We also established a menu of possible special provisions that could be awarded to designated entities in particular services, including installment payments, spectrum set-asides, bidding credits, and tax certificates. In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of these special provisions.

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[179] See para. 92, supra.

[180] 47 U.S.C. § 309(j)(4)(D).

[181] Id.

103. In keeping with the general parameters set forth in the Competitive Bidding docket, we propose specific measures and eligibility criteria for designated entities in the 4660-4685 MHz service designed to ensure that such entities are given the opportunity to participate both in the competitive bidding process and in the provision of service in the 4660-4685 MHz band. We seek comment on these proposals, and specifically on identifying special provisions that are tailored to the unique characteristics of the service or services that might be offered in the 4660-4685 MHz band and will create meaningful incentives and opportunities in the service for small businesses and businesses owned by minorities and/or women.

b. Businesses Owned by Women and Minorities

(1) Specific Special Provisions

104. Based on the list of special provisions for designated entities established in the Competitive Bidding Second Report and Order, we propose to utilize bidding credits and installment payments to encourage participation by businesses owned by women and minorities in auctions for the 4660-4685 MHz band. We tentatively conclude that affording businesses owned by women and minorities bidding credits and installment payments for licenses is the 4660-4685 band is the most cost-effective and efficient means of achieving Congress' objective of ensuring an opportunity for these designated entities to participate in the provision of service in the 4660-4685 MHz band, while preserving the advantages of competitive open bidding. We propose that installment payments be available on all of the licenses in this spectrum and that bidding credits be available as an additional encouragement for licenses on one of the proposed 5 MHz spectrum blocks. We seek comment on this proposal.

105. Apart from Congress' directive, we believe that ensuring the opportunity for women and minorities to participate in providing service in the 4660-4685 MHz band is important for the telecommunications industry. The record in the Competitive Bidding docket reflects a severe underrepresentation of women and minorities in telecommunications.[182] The record in the docket also shows that women and minorities have particular difficulties obtaining capital.[183] Given this history of underrepresentation of minorities and women in telecommunications and the inability of these groups to access financing, we find that the best way we can accomplish the statutory mandate is to provide bidding credits and installment payments exclusively to minority- and women-owned businesses.

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[182] See Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5575-78, paras. 103-107.

[183] Id. at 5573-75, paras. 98-102. The findings made and discussion in the Competitive Bidding Fifth Report and Order on this subject are incorporated here by reference.

106. In determining the appropriate amount of the bidding credit, we propose to consider several factors. First, our analysis of the telecommunications industry suggests the possibility that incumbent telecommunications providers may be able to utilize existing infrastructure and thus enjoy economies of scope in the provision of many of the services that may develop in this spectrum. Therefore, these incumbents may have the ability to bid more than first-time operators. Second, as indicated in the Competitive Bidding docket, we note that very few incumbent telecommunications providers are owned by minorities or women, so that a substantial discount may be necessary to put these designated entities on equal footing with incumbents in bidding for these licenses.

107. Finally, we consider the bidding credits established for businesses owned by minorities and women in other contexts. For the Interactive Video and Data Service and the nationwide narrowband PCS licenses, the bidding credit afforded to minority- and/or women-owned businesses was 25 percent. In the nationwide narrowband PCS auction, none of the licenses was won by minority or women-owned bidders, suggesting that the bidding credit may have been insufficient. In contrast, in the regional narrowband PCS auction, we used a higher bidding credit of 40 percent for businesses owned by women and minorities, regardless of size, on all regional narrowband PCS licenses on two channels. In addition to those bidding credits, we adopted an installment payment plan for women and/or minority owned businesses that obtain a regional narrowband PCS license on the same two channels.[184] The result of the narrowband auction was that 11 of the 30 licenses went to women or minority-owned firms.

108. We propose a bidding credit of 25 percent that would be available on one of the five proposed spectrum blocks. We seek comment on the appropriateness of the proposed bidding credits and installment payments for auctions in the 4660-4685 MHz band. In particular, commenters should address whether it is sufficient to provide installment payments as financial assistance solely to small businesses, which will include small businesses owned by women and minorities and rural telephone companies that meet the small business definition.

109. It is difficult to assess whether the greater participation by women and minorities in the regional narrowband PCS auction was attributable to the higher bidding credit or installment payments, or the combination. However, based on informal comments by several of the bidders in that auction, it appears that installment payments may have been the more effective method of attracting capital, possibly because it shifts some of the financial risk of future failure of these enterprises to the Government. Our proposal to use installment payments for all of the licenses in the 4660-4685 MHz band should result in significant participation by minorities and women and may reduce the need for bidding credits.

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[184] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Order on Reconsideration, PP Docket No. 93-253, 9 FCC Rcd 5306, 5306-07 (1994).

Comments are requested on this proposal. We also seek comment on the exact nature of the installment payment plan we should adopt in this context.

110. To prevent unjust enrichment by women and minorities trafficking in licenses acquired through the use of bidding credits or installment payments, we propose imposition of a payment requirement on transfers of such licenses to entities that are not owned by women or minorities. Female and minority-owned businesses seeking to transfer a license to an entity that is not owned by women or minorities would be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. The amount of the penalty would be reduced over time so that a transfer in the first two years of the license term would result in a payment of 100 percent of the value of the bidding credit; in year three of the license term the payment would be 75 percent; in year four the penalty would be 50 percent and in year five the payment would be 25 percent, after which there would be no payment.

(2) Eligibility Criteria

111. In the Competitive Bidding Second Report and Order, we adopted eligibility criteria for businesses desiring to benefit from the established special provisions for designated entities. Specifically, we determined that in order to be deemed a business owned by minorities and/or women, minorities or women must have at least 50.1 percent equity ownership and a 50.1 percent controlling interest in the designated entity. For limited partnerships, we determined that the general partner must be a minority and/or a woman (or an entity 100 percent owned and controlled by minorities and/or women) that owns at least 50.1 percent of the partnership equity. We also indicated that, for the most part, the interests of minorities and women in designated entities would be calculated on a fully-diluted basis.[185] In the broadband PCS context, we also established an alternative definition for minority- and female-owned businesses.[186] We seek comment on whether either of these definitions is appropriate for purposes of determining designated entity eligibility in the 4660-4685 MHz band, or whether we should adopt an alternative definition. We also propose to apply to the 4660-4685 MHz applicants the same affiliation and attribution rules for calculating equity and stock ownership that we have previously adopted in the PCS context. We propose to require the establishment of a "control group" for women and minority-owned firms and would require that the control group maintain both de facto and de jure control of an applicant.[187] We seek comment on this proposal.

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[185] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2396, para. 277.

[186] See 47 C.F.R. § 24.720(c).

[187] See, e.g., Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd at 446-51, paras. 77-86.

c. Small Businesses

(1) Specific Special Provisions

112. Based on the list of special provisions for designated entities established in the Competitive Bidding Second Report and Order, we seek comment on whether to adopt installment payments for small businesses bidding for licenses in the 4660-4685 MHz band. The record in the Competitive Bidding proceeding suggests that the most significant barrier for small business participation in the auctioning of 4660-4685 MHz spectrum will be access to adequate private financing to ensure their ability to compete against larger firms in the competitive bidding process. In the Competitive Bidding Second Report and Order, we concluded that a reduced down payment requirement coupled with installment payments is an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum.[188] We seek comment on whether such a mechanism would be an appropriate special provision for small businesses bidding for licenses in the 4660-4685 MHz band, and on whether any additional or alternative special provisions should be provided for small businesses in the 4660-4685 MHz context.

113. To ensure that large businesses do not become the unintended beneficiaries of installment payment provisions meant for small businesses, we also propose to make the unjust enrichment provisions adopted in the Competitive Bidding Second Report and Order applicable to installment payments by small business applicants. Specifically, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we will require payment of the remaining principal balance as a condition of the license transfer. We seek comment on this proposal including whether additional unjust enrichment provisions are necessary for the 4660-4685 MHz band.

(2) Eligibility Criteria

114. In the Competitive Bidding Second Report and Order, we adopted the existing SBA net worth/net income size standard as the generic eligibility criteria for small businesses.[189] Under this definition, an entity would qualify as a small business if its net worth is not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million. For broadband PCS, however, we defined a small business as any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of $40 million.[190] In the Competitive Bidding Reconsideration Order, we concluded that it was more appropriate to

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[188] See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2390, para. 238.

[189] Id. at 2395-96, para. 271.

[190] 47 C.F.R. § 24.720(b).

define the eligibility requirements for small businesses on a service-specific basis because of the diversity of services that may be subject to competitive bidding and the varied spectrum costs and build-out requirements associated with each service.[191] We contemplated that such an approach would allow us to take into account the capital requirements of each particular service in establishing the appropriate threshold. We therefore seek comment on whether we should utilize the SBA definition initially adopted in the Competitive Bidding Second Report and Order or, in the alternative, adopt a gross revenue standard like that used in the broadband PCS context. We ask commenters who believe that a gross revenue standard should be used as the eligibility criteria for small businesses to address the gross revenue threshold appropriate for the 4660-4685 MHz context along with any estimates of costs associated with build-out requirements. We also propose to apply to the 4660-4685 MHz applicants the same affiliation and attribution rules for calculating revenues that we have previously adopted in the PCS context. We seek comment on this proposal.

d. Rural Telephone Companies

115. We seek comment on whether we should provide bidding credits or other special provisions for rural telephone companies. Because it is unclear what specific uses may emerge in the 4660-4685 MHz band, it is difficult to assess the likelihood that such services would be attractive for implementation by rural telephone companies. We are similarly unable to determine with any certainty the potential prices these licenses may bring in rural areas. If prices in such areas are low, they should not present significant barriers to rural telephone companies. Also, under one possible approach, the degree of flexibility we would afford in the use of this spectrum, including provision for partitioning or leasing spectrum, should assist in satisfying the spectrum needs of rural telephone companies at low cost. Finally, as with other incumbent providers of telecommunications services, rural telephone companies may be able to benefit from the use of their existing infrastructure in the provision of certain services in this spectrum. Such economies of scale would give rural telephone companies an advantage in the bidding for such licenses. For these reasons, we do not believe that special preferences are needed to ensure adequate participation of rural telephone companies in the provision of services in this spectrum. However, comments on this analysis are requested.

e. Additional Special Provisions

116. In addition to the special provisions proposed above for the various classes of designated entities, we seek comment on whether additional special provisions should be adopted that would enhance our goal of ensuring their participation in the competitive bidding process for licenses in the 4660-4685 MHz band. We request that commenters give particular attention to the alternatives described below.

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[191] Competitive Bidding Reconsideration Order, 9 FCC Rcd at 7269, para. 145.

(1). Reduced Upfront Payments.

117. In the Competitive Bidding Second Report and Order, we concluded that upfront payment requirements would ensure that bidders are qualified and serious and would provide the Commission with a source of funds in the event of default or bid withdrawal.[192] We also noted that reduced upfront payments may be particularly appropriate for auctions of spectrum specifically set aside for designated entities as a means of encouraging participation in the auctions, particularly by all eligible designated entities. As a result, in adopting competitive bidding procedures for broadband PCS, we reduced the upfront payment requirement for the entrepreneurs' blocks, observing that requiring full compliance with the upfront payment requirement could discourage auction participation by designated entities.[193] We seek comment on whether there should be a similar reduction in upfront payment for any class of designated entities for any licenses auction in the 4660-4685 band. In addition, we ask commenters to address the costs and benefits with respect to auction administration and designated entity participation associated with a reduced upfront payment for licenses in the 4660-4685 band in the absence of a spectrum set-aside.

(2) Entrepreneurs' Block

118. Finally, we seek comment on whether to facilitate designated entities' participation in providing service in the 4660-4685 MHz band by designating one 5 MHz spectrum block as an "entrepreneurs' block." Even considering the special provisions for designated entities discussed above, we remain concerned in light of our experience with PCS that designated entities may have difficulties competing for 4660-4685 MHz licenses against large firms with significant financial resources. We seek comment on this analysis. We also seek comment on whether the Commission should establish an entrepreneurs' block or blocks if we license the spectrum in different size blocks.

119. If we adopt an entrepreneurs' block approach, we also seek comment on how eligibility for the block should be defined. In the first instance, we ask commenters to address whether applicants other than designated entities should be eligible to bid for entrepreneurs' block licenses. In our broadband PCS rules, we required entrepreneurs to comply with financial caps on the assets and gross revenues of the applicant, its affiliates, and major investors. These caps were set at a higher level than the caps for designated entity small businesses, but were nevertheless intended to exclude large, well-financed entities from eligibility. We seek comment on whether the same financial caps should be applied for determining eligibility for 4660-4685 MHz entrepreneurs' block licenses.

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[192] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2377, 2379, paras. 169, 176.

[193] Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5599-5600, para. 154.

120. We also seek comment on how designated entities should be treated within the entrepreneurs' block in terms of eligibility criteria and special provisions. Specifically, we ask commenters to address whether the definitions for small businesses and businesses owned by minorities and/or women should be different for purposes of determining eligibility for the entrepreneurs' block, what specific special provisions should be afforded to designated entities within the entrepreneurs' block, what type of attribution and affiliation rules should apply, and what additional measures are needed to protect against unjust enrichment. We also seek comment on what special provisions designated entities should receive within an entrepreneurs' block. For example, one alternative would be to provide bidding credits to designated entities within the block. In addition, small businesses and minority- and/or women-owned businesses within an entrepreneurs' block could be afforded an installment payment option combined with reduced upfront payments. We seek comment on these alternatives and on other special provisions that may be appropriate.

H. Technical Rules

121. The fact that we are proposing a new radio service for this band that can be used to provide any mobile or fixed communications service, regardless of whether that service is subscriber based or not, argues for general and minimal technical restrictions. Generally, different types of technical parameters would be used depending on whether the system involves fixed or mobile communications. Because this spectrum may be used for either, we must develop technical operating parameters that can accommodate both fixed and mobile services. To this end, we tentatively conclude that the rules adopted for PCS provide the best model for this new band. Specifically, we propose to limit the field strength at licensees' service area boundaries to 55 dBu unless licensees operating in adjacent areas agree to higher field strengths along their mutual border.[194] Licensees would be expected to coordinate their operations at the service area boundaries. Unlike PCS, where we required the power of any emission outside of the licensee's frequency block to be attenuated below the transmitter power (P) by at least 43 plus $10\log_{10}(P)$ or 80 decibels, whichever is less, we do not propose to establish adjacent-channel interference limits at the frequency boundaries between licensees in this band. Instead, we would encourage licensees to resolve adjacent channel interference problems.

122. We believe this approach provides licensees with the maximum amount of technical flexibility. We do, however, propose to require licensees to attenuate the power below the transmitter power (P) by at least 43 plus $10\log_{10}(P)$ or 80 decibels, whichever is less, for any emission at the edges of the 4660-4685 MHz band. We request comment on these proposals and any other technical rules that commenters believe are appropriate. We are especially interested in knowing whether the proposed signal strength limit is appropriate

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[194] The minimum field strength required for a good quality service for mobile reception in an urban environment is 35 dBu (CCIR Report 358-5) and the proposed 55 dBu field strength limit allows 20 dB additional for location variability.

to provide co-channel protection to systems operating in adjacent areas, while still providing licensees adequate signal strength to serve the geographic area for which they are licensed. We also request comment on whether a maximum transmitter power or maximum effective radiated power is necessary or whether licensees should be permitted to use any power that they believe is appropriate, provided that they do not exceed the maximum permissible field strength at the border of their licensed area. In addition, we specifically request comment on the feasibility of our proposal to not limit out of band emissions. Commenters addressing this issue should consider the effect that unlimited transmitter power may have on out of band emissions. Commenters should also specifically address the need for out of band emission at the edges of the entire 4660-4685 MHz (this is as opposed to a limit on out of band emissions within the band but between spectrum blocks. If commenters desire different or additional interference criteria, we request that they include very specific alternative proposals and rationale.

I. License Term

123. The Communications Act allows the Commission to establish a license term of up to 10 years, except for television or radio broadcasting stations, which may have a license term of up to 5 and 7 years respectively.[195] Previously, the Commission has established a 10 year license term for CMRS, but has used a 5 year license term for private services. For services in the 4660-4685 MHz band, we propose to establish a term of 10 years for licenses in this band, with a renewal expectancy based on that of PCS and cellular telephone licensees. This relatively long license term, combined with a high renewal expectancy, should help provide a stable regulatory environment that will be attractive to investors and, thereby, encourage development of this new frequency band. We note, however, that commenters have proposed using this band for auxiliary broadcast service and the statute requires that the term of any license for the operation of any auxiliary broadcast station or equipment must be concurrent with the term of the license for such primary television station.[196] Therefore, commenters should address whether we should allow differing license terms in this band. We seek comment on our general proposal and any other viable alternatives that commenters may suggest.

J. Construction Requirements

124. The very wide array of potential services that could be offered in this band makes it very difficult to develop construction requirements that can be applied fairly and equitably, without skewing the workings of the market. We also recognize our responsibility to assure that spectrum we assign is used effectively. Therefore, we propose to require build-out rules modeled on those adopted for broadband PCS. Specifically, we propose that within

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[195] 47 U.S.C. § 307.

[196] 47 U.S.C. § 307(c).

five years, licensees in this band offer service to one-third of the population in area in which they are licensed. Further, licensees would have to serve two-thirds of the population in the area in which they are licensed within ten years of being licensed. Failure by any licensee to meet these construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it. We request comment on this proposal and on whether it could unnecessarily limit the type of services provided. For instance, if a potential licensee wished to provide AAVS in this band, would such a service be able to meet the proposed construction requirements? We also request comment on whether these requirements are appropriate for private radio licensees who may not have to serve particular population segments within their service area. In addition, we seek comment on whether the Commission should establish a licensee defined service area, such as a cellular geographic service area (CGSA) which would allow the Commission to license areas to a different party where the existing licensee has not constructed. Such a proposal might encourage licensees to cover a larger geographic area or allow a new license to provide a service where the existing licensee believes that it is uneconomical to provide service in that area.

K. Regulatory Status

125. The Communications Act and Commission regulation often apply differing requirements based on the type of service and the regulatory status of licensees. For example, common carriers are generally subject to the provisions of Title II of the Act, but other licensees are not subject to these provisions. Also, Section 309 requires that the Commission provide public notice of tentative selectees for licenses and allow interested parties 30 days to file Petitions to Deny license applications for common carriers. As discussed above, the statute limits foreign ownership of common carrier licensees, but prohibits only foreign governments from obtaining private licenses. In addition, recent changes to the Communications Act have created different standards for Fixed and Mobile services for determining the regulatory status of a licensee. The Budget Act of 1993 created new statutory categories for mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as a mobile service that "is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public. . . ."[197] The statute provides that commercial mobile radio services are treated as common carriers, but allows the Commission the authority to forbear from regulating certain section of Title II.[198] The statute also preempts state regulation of rates and entry for both CMRS and PMRS, but allows states to petition the Commission for authority to regulate the rates of CMRS

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[197] 47 U.S.C. § 332(d)(1). See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994) (CMRS Second Report and Order).

[198] Specifically, the Commission may forbear from applying any section of Title II, except Sections 201, 202, and 208. Communications Act, § 332(c)(1)(A).

providers. For Fixed services, however, the Commission applies a judicial standard for determining whether a licensee is providing a common carrier service.[199] The Commission does not have the express authority to forbear from applying any provision of Title II to Fixed service common carriers. In addition, in the absence of a Commission decision to preempt, states are not preempted from regulating the intrastate rates or intrastate entry for Fixed common carrier services.[200]

126. We have decided to propose a new GWCS for the 4660-4685 band that would allow licensees to provide a variety or combination of Fixed and Mobile services. Under this service, both Fixed and Mobile applications would be permitted and an individual licensee could provide a number of Fixed and Mobile services. We note that, under our proposed approach, it may be difficult to determine the regulatory status of each licensee. We propose to rely on applicants to specifically identify the type of service or services they intend to provide, and that they include sufficient detail to enable the Commission to determine if the service will be Fixed or Mobile, and whether it will be offered as a commercial mobile radio service, a private mobile radio service, a common carrier Fixed service, or a private Fixed service. We note that the type of radio service provided may depend on our conclusions after reviewing the record in this proceeding. For instance, licensees may not be permitted to provide subscriber based services in this spectrum or in portions of this spectrum depending on the rules we ultimately adopt. We request comment on the most efficient manner in which to administer the requirements of the Communications Act and our rules, and grant licensees as much operational flexibility as possible.

127. We request comment on whether the Commission should develop a new application long form for this general allocation or require an applicant to be responsible for filing the appropriate license application based upon the nature of the service designated by the applicant. Based on the showing made in the application form and actual service provided, the licensee would be subject to those rules and statutory requirements that apply to such service. We seek comment on this proposal. We also request that commenters address whether it is necessary for the Commission to require licensees to notify the Commission if they change the type of service offered using some or all of their licensed spectrum even though the new use would be permissible under our rules.

L. Licensing Issues

128. We request comment on whether the Commission is required or should find it is in the public interest to adopt additional licensing rules in order to comply with the statutory requirement that we adopt assignment rules before August 10, 1995. For example, Section

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[199] See National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 642 (D.C. Cir.), cert. denied, 425 U.S. 999 (1976) (NARUC I).

[200] See Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

309(b)(1) of the Communications Act requires all applications for common carrier station authorizations (other than minor amendments excepted under Section 309(c)) to be placed on public notice for 30 days prior to grant, and Section 309(d) allows petitions to deny to be filed against such applications during the public notice period. Because some licensees may provide common carrier service, we seek comment on whether the Commission should adopt public notice and petition to deny procedures for some or all applicants in the 4660-4685 MHz band. If we do adopt such procedures, we propose to use rules similar to those contained in Section 22.130 of our Rules. We seek comment on this proposal. We also seek comment on whether to adopt rules regarding the amendment of applications and/or license modifications.

129. Finally, we request comment on whether any existing application or regulatory fees would apply if we develop a new service. In addition, we note that Section 310(d) of the Communications Act provides that no construction permit or station license may be transferred, assigned, or otherwise disposed of without Commission approval based on a finding that the public interest, convenience, and necessity will be served by the transaction. We request comment on specific rules we should adopt in order to implement this provision of the Communications Act for purposes of licensing services in the 4660-4685 MHz frequency band.

IV. ORDERING CLAUSE

130. IT IS ORDERED that Parts 2 and 15 of the Commission's Rules and Regulations IS AMENDED as specified in Appendix F, effective 30 days after publication in the Federal Register. Authority for issuance of this Report and Order and Second Notice of Proposed Rule Making is contained in Sections 4(i), 303(g), 303(r), 309(j), 332(a), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), 309(j), 332(a), and 403, and Section 115(a) of the National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 925(a).

V. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

131. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Analysis

132. The analysis required by the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendices D and E.

Comment Dates

133. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before March 20, 1995 and reply comments on or before April 4, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Contact Persons

134. For further information concerning this proceeding, contact Steve Sharkey, Office of Engineering and Technology, (202) 739-0723, or Martin D. Liebman, Wireless Telecommunications Bureau, (202) 418-0620.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

NTIA Preliminary Spectrum Reallocation Plan

Bands Identified for Reallocation	Reallocation Status	Reallocation Schedule
1390-1400 MHz	Exclusive	January 1999
1427-1432 MHz	Exclusive	January 1999*
1670-1675 MHz	Mixed	January 1999**
1710-1755 MHz	Mixed	January 2004
2300-2310 MHz	Exclusive	January 1996
2390-2400 MHz	Exclusive	Immediate
2402-2417 MHz	Exclusive	Immediate
3650-3700 MHz	Mixed	January 1999
4635-4660 MHz	Exclusive	January 1997*
4660-4685 MHz	Exclusive	Immediate

* Protection for a limited number of facilities would be required for an additional period of time.

** Limited immediate use of this spectrum would be considered.

APPENDIX B

Comments Filed in Response to the NPRM in ET Docket No. 94-32

1. 3Com Corporation (3Com)
2. A. Frank Adamson, Ph.D.
3. Advanced Micro Devices, Inc. (AMD)
4. Alcatel Network Systems, Inc. (Alcatel)
5. Amateur Television Network
6. American Radio Relay League, Incorporated (ARRL)
7. American Petroleum Institue (API)
8. American Telecasting, Inc. (ATI)
9. American West Airlines (AWI)
10. Andrew Corporation (Andrew)
11. Apple Computer, Inc. (Apple)
12. Association of Public-Safety Communications Officials International (APCO)
13. Association for Maximum Service Television, Inc and Other Major Television Broadcast Entities (MSTV)
14. Association of American Railroads (AAR)
15. AT&T Corp. (AT&T)
16. Avant-Garde Telecommunications, Inc. (AGT)
17. Bell Atlantic
18. Brian Robinson
19. Capital Cities/ABC, Inc. (ABC)
20. Cincinnati Microwave, Incorporated (CMI)
21. Claircom Communications Group, L.P. (Claircom)
22. Compaq Computer Corporation (Compaq)
23. Comsumer Electronics Group of the Electronics Industry Association (EIA)
24. Continental Airlines (Continental)
25. Cornell University
26. County of Los Angeles (L.A. County)
27. Cylink Corporation (Cylink)
28. David R. Couch
29. Digital Ocean, Inc.
30. Forest Industries Telecommunications (FIT)
31. Fusion Systems Corporation (FSC)
32. Fusion Lighting, Inc. (FLI)
33. Home Box Office (HBO)
34. IEEE 802, the LAN MAN Standads Committee (IEEE)
35. In-Flight Phone Corporation (In-Flight)
36. Industrial Telecommunications Association, Inc. (ITA)
37. International Business Machines Corporation (IBM)
38. International Microwave Power Institute
39. L. Stephen Bell
40. Leaco Rural Telephone Cooperative, Inc. (Leaco)
41. Loral/Qualcomm Partnership, L.P. (LQP)

42. Los Angeles County Sheriff's Department (LA Sheriff)
43. Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC)
44. Metricom, Inc. (Metricom)
45. Microsoft Corporation (Microsoft)
46. Mike Cheponis
47. Motorola, Inc. (Motorola)
48. National Research Council (NRC)
49. Norand Corporation (Norand)
50. Northern California Packet Association (NCPA)
51. Northern Amateur Relay Council of California, Inc. (NARCC)
52. NYNEX Telephone Companies (NYNEX)
53. Organization for the Protection and Advancement of Small
54. Telephone Companies (OPASTCO)
55. Pacific Bell Mobile
56. Part 15 Coalition
57. Palomar Amateur Radio Club, Inc. (PARC)
58. Pegasus Communications Inc. (Pegasus)
59. Personal Communciations Industry Association (PCIA)
60. Radio Amateur Satellite Corporation
61. Robert S. Bennett, PH.D.
62. Rochester Telephone Corporation (Rochestertel)
63. Rockwell International Corporation (Rockwell)
64. San Bernardino Microwave Society (SBMS)
65. Software Publishers Association
66. Southern California Repeater and Remote Base Association (SCRRBA)
67. Southwestern Bell Telephone Company (SWB)
68. SR Telecom Inc. (SRT)
69. Standard Microsystems Corporation (SMC)
70. Symbol Technologies, Inc. (Symbol)
71. Tadiran Telecommunications LTD (Tadiran)
72. TDS Telecommunications Corp.
73. Telecommunicaions Industry Association (TIA)
74. Tetherless Access Ltd. (TAL)
75. United States Telephone Association (USTA)
76. US West Communications (US West)
77. UTC
78. Western Multiplex Corporation (Western Multiplex)
79. Western States VHF-Microwave Society (Western States)
80. William A. Burns
81. Windata, Inc. (Windata)
82. Wireless Holdings, Inc. (HWI)
83. Wireless Information Networks Forum, Inc. (WINForum)
84. Wireless Cable Association International, Inc. (WCAI)
85. Xircom, Inc. (Xircom)

Late Filed Comments in Response to NPRM

86. Federal Highway Administration
87. Larus Corporation
88. New York University
89. Solectek Corporation
90. University of Arizonia

APPENDIX C

Reply Comments Filed in ET Docket 94-32

1. Advanced Micro Devices, Inc.
2. Alarm Industry Communications Committee
3. Alcatel Network Systems, Inc.
4. Amateur Radio Council of Arizona
5. American Institute of Aeronautics and Astronautics
6. American Mobile Satellite Corporation
7. American Petroleum Institute
8. American Radio Relay League, Incorporated
9. American Telecasting, Inc.
10. Andrew Corporation
11. Apple Computer, Inc.
12. Association of American Railroads
13. AT&T Corp.
14. Claircom Communications Group, L.P.
15. Compaq Computer Corporation
16. Comsat Corporation
17. Cox Enterprises, Inc. and Comcast Corporation
18. Cylink Corporation
19. ETM Solar Works
20. Frontier Corporation
21. GTE Service Corporation
22. In-Flight Phone Corporation
23. Industrial Telecommunications Association, Inc.
24. Interdigital Communications Corporation
25. International Business Machines Corporation
26. International Space Power Program
27. James S. Kaplan
28. Metricom, Inc.
29. Micron Communications, Inc.
30. Mike Cheponis
31. Motorola, Inc.
32. National Telephone Cooperative Association
33. National Assoc. of Broadcasters & the Assoc. for Max. Service TV
34. Northern Amateur Relay Council of California, Inc
35. Part 15 Coalition
36. Personal Communications Industry Association
37. Radio Amateur Satellite Corporation
38. San Bernardino Microwave Society
39. Society of Broadcast Engineers, Inc.
40. Southern California Repeater and Remote Base Association
41. Southwestern Bell Telephone Company
42. Space Studies Institute

43. SR Telecom Inc.
44. SUNSAT Energy Council
45. Symbol Technologies, Inc.
46. Tetherless Access LTD.
47. Texas A&M University
48. United States Telephone Association
49. UTC
50. William A. Burns

Late filed Reply Comments

51. Amateur Television Network
52. Proxim, Inc.

APPENDIX D

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. **Need and purpose of this action:** This Report and Order allocates 50 megahertz of spectrum that was transferred from Federal Government to private sector use. Transfer and allocation of this spectrum was required by the Omnibus Budget Reconciliation Act of 1993.

2. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

3. **Significant alternatives considered:** Commenters in this proceeding supported allocating the spectrum under consideration for a number of various services. These services include wireless local loops, a ground-to-air aeronautical audio/video service, mobile satellite service, private services, unlicensed PCS devices, other unlicensed devices, amateur service, interactive data, audio and video services, fixed service, mobile services, and broadcast auxiliary services. This Report and Order considers all of these uses and provides analysis regarding each. As a result of this analysis, the Commission determined that the action taken in this Report and Order would provide the most beneficial use of the spectrum under consideration.

APPENDIX E

FURTHER INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. **Reason for Action:** The proposals for technical rules service rules, and licensing mechanisms proposed herein are for use of spectrum that has been Transferred from Federal Government to private sector use. The Commission adopted allocations for this spectrum on February 7, 1995. Accordingly, these proposals are necessary to provide a structure for non-Government entities to use the spectrum.

2. **Objectives:** The Commission seeks to provide service, technical rules, and to issue licenses, for use of this spectrum in a manner that provides the greatest potential benefit to the public by providing for the introduction of new services and the enhancement of existing services. These new and enhanced services will create new jobs, foster economic growth, and improve access to communications by industry and the American public.

3. **Legal Basis:** The legal basis for these rule changes is found in Sections 4(i), 303(g), 303(r), 309(j), 332(a), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), 309(j), 332(a), and 403 and Section 115(a) of the National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 925(a).

4. **Reporting, Recordkeeping, and Other Compliance Requirements:** The proposals under consideration in this Notice of Proposed Rulemaking may impose certain reporting and recordkeeping requirements on licensees and others utilizing this spectrum.

5. **Federal Rules Which Overlap, Duplicate or Conflict With These Rules:** None.

6. **Description, Potential Impact, and Number of Small Entities Involved:** Many small entities could be positively affected by this proposal because the proposal will provide for the introduction of new, competitive communications and will foster new technologies resulting in new jobs, economic growth, and improved access to communications by industry, including small entities. The full extent of the impact on small entities cannot be predicted until various issues raised in the proceeding have been resolved. After evaluating the comments filed in response to the Notice, the Commission will examine further the impact of all final rules in this proceeding on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

7. **Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:** This Second Notice of Proposed Rule Making solicits comments on a variety of alternatives, including as to how our licensing mechanism, service rules, and technical rules can but structured to serve a variety of needs.

APPENDIX F

Final Rules

A. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AN REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303 and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended to read as follows:

a. In the 2390-2450 MHz band and the 4500-4800 MHz band, revise all columns to read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

International table			United States table		FCC use designators	
			Government	Non-Government	Rule Part(s)	Special-use

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government	Non-Government	Rule Part(s)	Special-use frequencies
			Allocation MHz	Allocation MHz		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
2300-2450 FIXED. MOBILE. Amateur. Radiolocation.	2300-2450 FIXED. MOBILE RADIOLOCATION. Amateur.		2300-2310 RADIOLOCATION. Fixed. Mobile. US253 G2	2300-2310 Amateur. US253	Amateur (97).	
			2310-2360 Mobile. Radiolocation. Fixed. 751B US276 US327 US328 G2 G120	2310-2360 BROADCASTING-SATELLITE. Mobile. 751B US276 US327 US328		Digital Audio Radio Services
			2360-2390 MOBILE. RADIOLOCATION. Fixed. US276 G2 G120	2360-2390 MOBILE. US276		
			2390-2400 G122	2390-2400 AMATEUR.	Radio Frequency Devices (15). AMATEUR (97).	
			2400-2402 RADIOLOCATION. 664 752 G2	2400-2402 Amateur. 664 752	Amateur (97).	
664 751A 752	664 750B 751 751B 752		2402-2417 664 752 G122	2402-2417 AMATEUR. 664 752	AMATEUR (97). Radio Frequency Devices (15).	
			2417-2450 RADIOLOCATION. 664 752 G2	2417-2450 Amateur. 664 752	Amateur (97).	

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government	Non-Government	Rule Part(s)	Special-use frequencies
			Allocation MHz	Allocation MHz		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
4500-4800 FIXED. FIXED-SATELLITE (space-to-Earth) 792A. MOBILE.			4500-4660 FIXED. MOBILE. US245	4500-4660 FIXED-SATELLITE (space-to-Earth). 792A US245		
			4660-4685 G122	4660-4685 FIXED. FIXED-SATELLITE (space-to-Earth). MOBILE. 792A US245		
			4685-4800 FIXED. MOBILE. US245	4685-4800 FIXED-SATELLITE (space-to-Earth). 792A US245		
*	*	*	*	*	*	*

b. The text of footnote G2 is revised and the text of footnote G122 is added to read as follows:

Government (G) Footnotes

* * * * *

G2 In the bands 216-225, 420-450 (except as provided by US 217), 890-902, 928-942, 1300-1400, 2300-2390, 2400-2402, 2417-2450, 2700-2900, 5650-5925, and 9000-9200 MHz, the Government radiolocation is limited to the military services.

* * * * *

G122 The bands 2390-2400, 2402-2417 and 4660-4685 MHz were identified for immediate reallocation, effective August 10, 1994, for exclusive non-Government use under Title VI of the Omnibus Budget Reconciliation Act of 1993. Effective August 10, 1994, any Government operations in these bands are on a non-interference basis to authorized non-Government operations and shall not hinder the implementation of any non-Government operations.

* * * * *

B. Part 15 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 15 - RADIO FREQUENCY DEVICES

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. sections 154, 302, 303, 304, and 307.

2. The Table of Contents of Part 15, Subpart D, is revised to read as follows:

* * * * *

Subpart D -- Unlicensed Personal Communications Services Devices

* * *

15.321 Specific requirements for asynchronous devices operating in the 1910-1920 MHz and 2390-2400 MHz bands.

* * * * *

3. Section 15.301 is revised to read as follows:

§ 15.301 Scope.

This subpart sets out the regulations for unlicensed personal communications services (PCS) devices operating in the 1910-1930 MHz and 2390-2400 MHz frequency bands.

4. Section 15.303, paragraph (g) is revised to read as follows:

§ 15.303 Definitions.

* * * * *

(g) *Personal Communications Services (PCS) Devices [Unlicensed].* Intentional radiators operating in the frequency bands 1910-1930 MHz and 2390-2400 MHz that provide a wide array of mobile and ancillary fixed communication services to individuals and businesses.

* * * * *

5. Section 15.311 is revised to read as follows:

§ 15.311 Labelling requirements.

In addition to the labelling requirements of Section 15.19(a)(3), all devices operating in the frequency band 1910-1930 MHz authorized under this subpart must bear a prominently located label with the following statement:

> Installation of this equipment is subject to notification and coordination with UTAM, Inc. Any relocation of this equipment must be coordinated through, and approved by UTAM. UTAM may be contacted at [insert UTAM's toll-free number].

6. Section 15.319 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 15.319 General technical requirements.

(a) The 1910-1920 MHz and 2390-2400 MHz bands are limited to use by asynchronous devices under the requirements of Section 15.323. * * *

* * * * *

7. Section 15.321 is amended by revising paragraphs (a) and (b) and the first sentence of paragraph (e) to read as follows:

§ 15.321 Specific requirements for asynchronous devices operating in the 1910-1920 MHz and 2390-2400 MHz bands.

(a) Operation shall be contained within either or both of the 1910-1920 MHz and 2390-2400 MHz bands. The emission bandwidth of any intentional radiator operating in these bands shall be no less than 500 kHz.

(b) All systems of less than 2.5 MHz emission bandwidth shall start searching for an available spectrum window within 3 MHz of the band edge at 1910, 1920, 2390, or 2400 MHz while systems of more than 2.5 MHz emission bandwidth will first occupy the center half of the band. Devices with an emission bandwidth of less than 1.0 MHz may not occupy the center half of the band if other spectrum is available.

* * * * *

(e) The frequency stability of the carrier frequency of intentional radiators operating in accordance with this section shall be $\pm$10 ppm over 10 milliseconds or the interval between channel access monitoring, whichever is shorter. * * *

* * * * *

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-53
Washington, D.C. 20554

In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

NOTICE OF PROPOSED RULEMAKING

Adopted: February 7, 1995 Released: February 17, 1995

Comment Date: March 28, 1995
Reply Comment Date: April 28, 1995

By the Commission: Commissioners Quello and Ness issuing separate statements.

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I. INTRODUCTION

1. This Notice of Proposed Rulemaking proposes new policies governing the participation of foreign carriers in the U.S. international telecommunications market. In this Notice, we set out three goals of our regulation of the U.S. international telecommunications market: (1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets. We consider how to achieve these goals through implementation of Sections 214 and 310 of the Communications Act, as amended ("the Act"). We find that allowing foreign carrier entry into the U.S. international services market will further the public interest by providing additional competition that will benefit consumers. We tentatively conclude, however, that unrestricted foreign carrier facilities-based entry is not in the public interest when U.S. carriers do not have effective opportunities to compete in the provision of services and facilities in the foreign carrier's primary markets.

2. We propose to modify our public interest standard for considering foreign carrier applications under Section 214 of the Act to enter the U.S. market to provide international facilities-based services. We seek comment on requiring as an important element of our public interest standard a demonstration that effective market access is, or will soon be, available to U.S. carriers seeking to provide basic, international telecommunications facilities-based services in the primary markets served by the carrier desiring entry. We also would continue to consider other factors as part of our public interest analysis, such as national security, the openness of other telecommunications segments of the foreign carrier's primary markets, and the ability and incentives of the foreign carrier to discriminate against unaffiliated U.S. carriers.

3. In addition, this Notice proposes a specified level of foreign carrier ownership in a U.S. carrier at which the proposed entry standard would apply. We ask whether it is desirable to consider an applicant to be "affiliated" with a foreign carrier for purposes of our new rules when the foreign carrier acquires an ownership interest of a certain minimum level or a controlling interest at any level. We request comment on whether the minimum level of ownership should be set at greater than ten percent, twenty-five percent, or some other level of the capital stock of the applicant. This Notice also clarifies the definition of a facilities-based carrier.

4. Finally, this Notice asks whether the goals of this proceeding would be served by incorporating the proposed effective market access test as an element of the Section 310(b)(4) public interest analysis applicable to foreign entities seeking to acquire an indirect ownership interest of more than 25 percent in U.S. radio licensees. Thus, the Notice asks whether our evaluation of the public interest should consider whether the primary markets of the foreign entity offer effective market access to U.S. licensees to provide the same type of radio-based services as requested in the United States. We also seek comment on other public interest factors we should consider.

5. We seek public comment on whether these proposals are administratively feasible and whether these approaches or other alternatives will best serve our goals.

II. BACKGROUND

A. Petitions for Rulemaking

1. AT&T's Petition

6. AT&T filed a petition for rulemaking on September 22, 1993, requesting that the Commission institute a rulemaking to: (1) comprehensively review the issues arising from foreign carrier participation in the U.S. telecommunications market; and (2) promulgate rules that address "the current regulatory dichotomy between the United States and foreign countries."[1] AT&T states that the international telecommunications industry is changing from a bilateral services model to a global market, where customers are demanding "seamless" international networks. It argues that U.S. carriers must obtain comparable market access abroad to compete effectively in the provision of basic interexchange and international services. Likewise, it says, foreign carriers wishing to become global are compelled to gain entry to the U.S. market in some manner. According to AT&T, the traditional regulatory concern about "whipsawing" has been

[1] FCC File No. RM-8355.

overshadowed by the possibility that a foreign monopoly carrier now may be in a position to provide service originating or terminating in the United States and its home country, whereas U.S. competing carriers would not.

7. First, AT&T proposes that, before approving foreign carrier entry into the United States, the Commission should make a finding as to whether comparable opportunities for U.S. carriers to compete in the home markets of the prospective entrants presently are available or will be available within a reasonable period not to exceed two years.[2] Second, AT&T states that the Commission should condition any authorization for entry in the U.S. services market by foreign carriers having the ability to discriminate among U.S. carriers in their home markets on the agreement by the foreign carrier to nonstructural safeguards to minimize the opportunity for such discrimination. AT&T states that, at a minimum, the Commission should require: (1) no exclusive arrangements for the provision of basic or enhanced services; (2) proportionate return of foreign-billed traffic; (3) cost-based accounting rates within 30 days; (4) consent of originating and terminating carriers to refile U.S. originating or terminating traffic; (5) interconnection or distribution arrangements in the foreign country that are available to all U.S. carriers; (6) no special concessions certification; and (7) information received from other U.S. carriers to be protected and not used for the benefit of itself or its U.S. affiliate.

8. Several comments were filed in response to AT&T's petition.[3] Only Sprint supports AT&T's petition. The majority

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[2] AT&T states that a successful comparable market access showing should include the following elements: 1) U.S. carriers can offer substantially similar services under similar conditions in the foreign country as can be offered in the United States; 2) existence of safeguards to prevent cross-subsidization between the monopoly and competitive market segments; 3) equal access available; 4) availability of published, non-discriminatory tariffs for interconnection in the foreign country; 5) portability of telephone numbers; 6) timely and non-discriminatory disclosure of network information; 7) protection of carrier and customer proprietary information; and 8) effective competition actually exists.

[3] Supporting comments were filed by Sprint Communications Co. L.P. (Sprint). The parties expressing some form of opposition to AT&T's petition are ACC Global Corp. (ACC), the British Embassy, British Telecommunications plc (BT), Cable & Wireless, Inc. (C&W), DOMTEL Communications, Inc. (DOMTEL), EMI Communications Corp. (EMI), ENTEL International B.V.I. Corp. (ENTEL-Chile), IDB Communications Group, Inc. (IDB), Teleglobe

of the commenters oppose AT&T's petition, arguing generally that AT&T's proposed rules would require "mirror reciprocity," which the opponents claim would be unrealistic given the varied telecommunications systems. They also argue that existing safeguards, especially those contained in the 1992 International Services Order[4] and the TLD Order[5] are sufficient to protect competition in the U.S. international and interexchange marketplace.[6] They support the Commission's policy of deciding market entry questions on a case-by-case basis, so as to take into consideration specific circumstances in each case.[7]

2. IDB's Petition

9. Issues related to AT&T's petition also were raised in a petition for rulemaking filed by IDB on October 29, 1993.[8] In this petition, IDB asks the Commission to adopt a uniform definition of a facilities-based carrier for purposes of Commission rules and policies governing international common carriers. IDB states that a uniform definition is important to provide carriers with certainty regarding their reporting obligations and their ability to interconnect international private lines to the U.S. public switched network. IDB proposes that we regulate a carrier as a facilities-based carrier when it obtains the maximum interest in the underlying facility permitted by law. AT&T filed comments against IDB's petition, saying there is a clear definition which need not be changed. MFS International, Inc. (MFS) supports IDB's petition. Because the issues involved in adopting such a definition directly relate to how we regulate U.S. international carriers, we will address IDB's petition in this rulemaking.

Inc. (Teleglobe), Telefonica Larga Distancia de Puerto Rico, Inc. (TLD), Coalition of International Communications Users (International Telecom Users), MCI Telecommunications Corp. (MCI), and Motor-Columbus AG (Motor-Columbus).

[4] Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992)(International Services).

[5] Telefonica Larga Distancia de Puerto Rico, 8 FCC Rcd 106, 111-113 (1992)(TLD Order).

[6] See MCI Comments at 5; TLD Comments at 5-6; C&W Comments at 6-7, 9-11, 13; ENTEL-Chile Comments at 2-3, 8-9; IDB Comments at 4-5.

[7] See ENTEL-Chile Comments at 7, and ACC Comments at 2-3.

[8] FCC File No. RM-8392.

B. Existing Policy Under Section 214

10. We currently examine applications filed by foreign carriers or their U.S. affiliates (collectively "foreign carriers") for international Section 214 authority on a case-by-case basis. We balance our policy in favor of open market entry against the potential for undue discrimination by the foreign parent against unaffiliated U.S. carriers. Under this policy, we have authorized foreign carriers to resell international switched services,[9] non-interconnected private line services, and private line services interconnected to the public switched network ("PSN") upon a determination that the foreign country on the other end of the circuit provides equivalent opportunities to U.S. carriers to resell interconnected private lines.[10] In addition, we recently authorized several foreign carriers to acquire U.S. international facilities subject to safeguards to protect U.S. carriers providing international service from discrimination.[11]

11. In recent years, we have addressed the issues raised by foreign carrier market entry in several significant cases. In 1991, we authorized Atlantic Tele-Network, Inc. (ATN), a 100 percent U.S.-owned carrier, to provide facilities-based switched service to Guyana, even though ATN indirectly controlled the monopoly service provider in Guyana.[12] To protect against potential discrimination that could arise on the U.S.-Guyana route by virtue of ATN's bottleneck control over Guyana's telecommunications infrastructure, we imposed on ATN the same conditions then placed on international common carriers classified as dominant, foreign-owned carriers, as well as other nondiscrimination safeguards.

12. A year later, we approved the acquisition of Telefonica Larga Distancia de Puerto Rico (TLD), a U.S. domestic and

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[9] See, e.g., Cable & Wireless Communications, Inc., 7 FCC Rcd 6855 (Int. Fac. Div. 1992); BT North America Inc., DA 94-1257, International Bureau, rel. Nov. 14, 1994.

[10] See, e.g., Cable & Wireless, Inc., DA-1344, Tele. Div., rel. Dec. 8, 1994; Cable & Wireless, Inc., DA 94-1227, Tele. Div., rel. Nov. 2, 1994; Cable & Wireless, Inc., 8 FCC Rcd 1664 (Com. Car. Bur. 1993); fONOROLA Corporation and EMI Corporation, 7 FCC Rcd 7312 (1992), Order on Recon., 9 FCC Rcd 4066 (1994).

[11] See infra paras. 12-14.

[12] Atlantic Tele-Network, Inc., 6 FCC Rcd 6529 (1991), appl. for review denied, 8 FCC Rcd 4776 (1993), appeal pending sub nom. Atlantic Tele-Network, Inc. v. FCC, U.S. Court of Appeals, D.C. Circuit, No. 93-1616.

international long distance carrier, by Telefonica de Espana (Telefonica), the government-controlled monopoly carrier of Spain.[13] Because TLD would be controlled by the Spanish telecommunications administration, which exercised bottleneck control over Spain's telecommunications infrastructure, we imposed regulatory safeguards to prevent TLD from acting in concert with Telefonica or other foreign carriers to discriminate against U.S. carriers in the terms and conditions of access to foreign markets for the origination and termination of U.S. international traffic. We noted that, in this particular instance, the potential for anticompetitive harm to U.S. carriers was mitigated by the fact that the applications involved a limited number of circuits; traffic would originate only from Puerto Rico and the U.S. Virgin Islands; and no interconnected private line service would be involved. We also considered the benefit to the Puerto Rico government of the capital generated by the privatization of TLD. However, we said that, with respect to future facilities-based applications from TLD (or any carrier affiliated with a foreign carrier), we would assess whether the authority sought posed an additional risk of anticompetitive behavior, and, if so, whether regulatory safeguards would be sufficient to protect against it.

13. In June 1994, we authorized ENTEL-Chile, a Chilean long distance carrier, to acquire the U.S. carrier AmericaTel.[14] We found that: (1) Chile's market for domestic long distance and international services was increasingly competitive and open to U.S. investment and participation; (2) Chile has increasingly liberalized its telecommunication laws and regulations aimed at promoting competition and preventing discrimination against U.S. and other foreign carriers; and (3) the nondiscrimination safeguards available under Chile's regulatory regime and the safeguards we imposed as a condition of authorization would be sufficient to protect U.S. carriers in their provision of international service between the United States and Chile. We required AmericaTel to submit annual progress reports detailing the status of the telecommunications industry and regulatory regime in Chile and reserved the right to review the terms and conditions of the authorization in the event that the safeguards imposed in the order or by virtue of Chilean regulation failed to sustain competition on the U.S.-Chile route.

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[13] TLD Order, 8 FCC Rcd 106.

[14] AmericaTel Corporation, 9 FCC Rcd 3993 (1994)(AmericaTel Order). At the time of the AmericaTel Order, Telefonica indirectly owned 20 percent of ENTEL-Chile. Telefonica has since divested its interest. See Letter from Raul R. Rodriguez, Counsel to AmericaTel Corporation, to William F. Caton, Acting Secretary, FCC, dated October 31, 1994.

14. Shortly thereafter, we reviewed the British Telecommunications plc (BT) acquisition of a non-controlling interest in MCI as part of a global alliance to provide services to customers worldwide.[15] We found that the terms of the investment did not result in a transfer of control to BT requiring prior FCC approval and that BT's 20 percent investment in MCI, even when combined with other foreign ownership for a total of up to 28 percent foreign ownership in MCI, was permissible under Section 310(b)(4) of the Communications Act. Additionally, we found that MCI's commitments to accept no special concessions and to maintain certain provisioning and maintenance records, combined with the reporting requirements we imposed, adequately protected against the potential for BT to leverage its dominant position in the U.K. telecommunications market to discriminate in favor of MCI over competing U.S. carriers. In so deciding, we took into account the United Kingdom's relatively liberal regulatory regime and the existence of competition in the U.K. domestic telecommunications market.

C. Existing Policy Under Section 310

15. Section 310(b)(4) establishes benchmarks applicable to foreign entities seeking to acquire an ownership interest in the parent company of a U.S. radio licensee. Specifically, Section 310(b)(4) imposes the following benchmarks: 25 percent foreign ownership, 25 percent foreign directors, and no foreign officers. Currently, the Commission examines requests to exceed the Section 310(b)(4) benchmarks on a case-by-case basis, and has generally considered the following factors: national security, the extent of alien participation in the parent holding company, and the nature of the license, including whether the licensee exercises control over content. In addition, the Commission may consider any other public interest factors appropriate.

16. One of Congress' principal reasons for enacting Section 310 of the Communications Act of 1934 was its concern for national security and preventing alien activities against the government during a time of war.[16] Accordingly, the Commission

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[15] BT/MCI Declaratory Ruling, 9 FCC Rcd 3960 (1994)(BT/MCI Order).

[16] See generally S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934). See also Moving Phones Partnership L.P. v. FCC, 998 F.2d 1051, 1055-56 (D.C. Cir. 1993)(referring to "national security policy underlying section 310(b)" and indicating that "the rationale is equally applicable to common carrier radio stations, as they, also, are a part of the nation's communications network"). The original national security rationale for limiting foreign ownership in a parent corporation has less applicability today than it had in the 1930's. Today there is a plethora of

has traditionally sought to ascertain whether a country with which a prospective licensee or its parent is associated enjoys "close and friendly relations with the United States" and, therefore, is not a "national security concern."[17]

17. The Commission has also traditionally considered the extent of alien participation in the parent corporation of a Title III radio licensee. More specifically, the Commission has considered where the parent corporation is incorporated (the United States or elsewhere); the citizenship of the stockholders, officers and directors of the parent corporation; and whether there are intermediate corporations between the licensee and the parent corporation that are incorporated in the United States, are owned by U.S. citizens or interests, and have U.S. officers and directors.[18]

18. In addition, the Commission has traditionally considered the type of radio license at issue in assessing whether the public interest would be disserved by foreign ownership in a parent corporation exceeding the Section 310(b)(4) benchmarks. For example, the Commission has concluded that concern about the effect of foreign ownership on national security is lessened when common carrier radio licenses are involved because they are "passive" in nature and the licenses confer no control over the content of transmissions.[19]

19. Finally, the Commission may also consider other relevant factors, including the furtherance of established Commission policies such as increased competition or the wide

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service providers. No single licensee which is owned in part by a foreign corporation could take over the wireless or wireline services in the United States in a time of war.

[17] See, e.g., GRC Cablevision, Inc., 47 FCC2d 467, 468 (1974) ("We note . . . that the non-citizens are from a country [Canada] that has traditionally had close and friendly relations with the United States . . . .").

[18] See, e.g., BT/MCI Order, 9 FCC Rcd at 3964, para. 22 (1994).

[19] BT/MCI Order, 9 FCC Rcd at 3964, para. 23; Teleport Transmission Holdings, Inc., 8 FCC Rcd 3063 (Com. Car. Bur. 1993); IDB Communications Group, Inc., 6 FCC Rcd 4652, 4653 (Com. Car. Bur. 1991); Data General Corporation and Digicom, Inc., 2 FCC Rcd 6060 (Dom. Fac. Div. 1987).

dissemination of licenses.[20]

III. DISCUSSION

20. The focus of telecommunications service providers has become increasingly global over the last several years, reflecting the increasingly global nature of the economy. The United States has become the most vital market for shaping world competition -- over 20 percent of all international communications services involve the United States.[21] Most of the major U.S. corporations are now multinational. Over 40 percent of the world's multinational corporations are headquartered in the United States.[22] These commercial customers prefer one-stop shopping to satisfy their varied and specialized communications needs. In addition, the many Americans who travel internationally, or have family or friends in other countries, have an interest in efficient, affordable global telecommunications. International telecommunications service offerings increasingly involve provision of an "end-to-end" package of services, including domestic (in two or more countries) and traditional international services. Both U.S. and foreign telecommunications service providers are developing strategies to serve their customers' needs through alliances with other service providers and entry into foreign international and domestic markets.

21. Our procompetitive U.S. regulatory policy has permitted a number of foreign carriers to enter the U.S. international and domestic services market to meet customer demands. Many other countries permit various forms of entry into their markets by foreign-based carriers, including many U.S. telecommunications providers. When such entry has been accompanied by regulatory liberalization, countries allowing entry already are experiencing the benefits of competition. We believe both the carriers and the consumers of those countries with liberalized entry policies should receive the benefits of having their carriers compete in the lucrative U.S. market.

22. But many important foreign communications services and facilities markets or market segments remain closed to U.S.

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[20] See, e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2348, 2349, para. 4 (1994) (In which Commission announced policy of promoting competition among a diverse group of service providers).

[21] See ITU Direction of Traffic: International Telephone Traffic, 1994, p.7, Table 2.2; TeleGeography 1, 85 (G. Staple ed. 1993).

[22] Telecommunications Reports, Oct. 10, 1994, at 17.

competition, even while entities from those markets have entered or seek to enter similar U.S. markets.[23] As detailed below, asymmetric market access is detrimental to both U.S. service providers and U.S. consumers. Closed foreign markets preserve the market power of foreign entities in their home markets and closed markets may inhibit competition in the provision of global communications services.[24]

23. Under these circumstances, current policies based on the traditional correspondent services model[25] may not adequately address questions of market access, undue discrimination and potential anticompetitive effects that arise in today's evolving telecommunications markets, where carriers seek entry on both ends of international circuits. Further, our case-by-case review of foreign carrier applications has caused uncertainty in the market due to the lack of a clear standard for evaluating applications by foreign carriers with different degrees of market power in their home markets. Moreover, there is a risk that case-by-case determinations of the public interest may inadvertently underemphasize the general global interest of the United States in promoting a competitive world market.

24. In addition, our current approach to considering foreign entry into U.S. radio-based telecommunications and broadcast markets through application of Section 310(b)(4) may not be the most effective means of promoting global competition in these areas. It may be that our decisions in public interest determinations under Section 310(b)(4) should more directly consider how the decision will influence the development of a competitive market for international communications services.

25. We believe a rulemaking proceeding would help the Commission to articulate standards to provide more coherent principles to guide its deliberations concerning individual cases. A formal rulemaking also would give foreign entities more certainty when making investment decisions, and provide an

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[23] For instance, in 1993 the Office of Technology Assessment concluded that 85 percent of the European Union's ("E.U.'s") telecommunications services market remained closed to foreign entities. In the Asia-Pacific region, most countries, including South Korea, Singapore, Malaysia, China, and Japan maintain a monopoly in basic local voice services.

[24] See infra paras. 28-29.

[25] In a traditional correspondent services arrangement, a U.S. carrier enters into an operating agreement with an unaffiliated foreign carrier under which the two companies agree to jointly own and operate international facilities and terminate each other's telecommunications traffic.

incentive for foreign administrations with currently closed markets to consider opening their markets.

A. Commission Goals

26. We have three basic goals in this rulemaking:

1. To promote effective competition in the global market for communications services.

2. To prevent anticompetitive conduct in the provision of international services or facilities.

3. To encourage foreign governments to open their communications markets.

27. The promotion of effective competition in the global market is our primary goal. Such competition will achieve for U.S. consumers reduced rates, increased quality, and new innovative services, including the availability of global communications services. Thus, through this rulemaking, we intend to promote the opportunity for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness. As explained below, the other two goals are necessary to reach this first goal.

28. A necessary step towards obtaining effective competition is the prevention of anticompetitive conduct in the provision of international services or facilities. In a truly competitive global market, entry of foreign carriers into the U.S. international market would be procompetitive. However, because global competition remains highly asymmetric, unrestricted entry by foreign carriers from closed markets into the open U.S. market has the potential to inhibit competition, particularly with respect to the provision of global communications services to high-end users such as multinational companies. For instance, a foreign carrier would be able to acquire 1+ access to U.S. consumers and hold itself out as a ubiquitous provider of U.S. international services while U.S. carriers could not make the same representations in the foreign carrier's home market. In addition, such a carrier would be able to offer its customers benefits such as lower costs and faster provisioning of services provided between its closed markets and the United States.

29. Such conduct by foreign carriers may have anticompetitive effects for several reasons. First, it preserves and maintains a monopoly in the foreign carrier's home market. Second, it allows the foreign entity to use that monopoly to gain a competitive advantage in other markets that are, or could be, competitive, including communications between its foreign home market and the United States, communications in the United

States, and global network services. The foreign competitor has a competitive advantage, and will therefore win customers, not because of its superior business acumen, responsiveness to customers, or technological innovation, but because of its protected status in its home market. The possession of such unmeritorious advantages is a disservice to consumers in all these markets because, in the absence of full competition on the merits by all competitors, consumers do not receive reduced rates, increased quality, and innovation.

30. In general, the potential for exploitation of a foreign carrier's market power is decreased by: (1) access to facilities at both ends of the international connection for all U.S. carriers; and (2) effective competitive safeguards (including interconnection rules) enforced by an appropriate regulatory authority at both ends. Our decision in AmericaTel shows our willingness to accept foreign carrier entry if these two conditions are met. If, however, the foreign carrier is not subject to facilities competition and competitive safeguards, its affiliation with a U.S. carrier or entry into the U.S. market may raise serious competitive questions.

31. Therefore, another key to global competition is foreign market liberalization. It is unlikely competition could thrive if a particular market keeps out some of its most effective global competitors. The demand for seamless global services by business means that U.S. carriers serving the other country must be able to originate traffic from their customers in that country to other markets around the world. Encouraging global competition further means that there needs to be international facilities-based competition on the U.S. and foreign ends of an international route. Open markets permit U.S. carriers to respond to foreign carriers in relevant markets, allowing U.S. carriers to be healthier competitors both at home and abroad. For example, U.S. wireless service providers' participation in foreign countries' cellular markets has strengthened both U.S. and foreign competitors and has resulted in improved service to both foreign and U.S. consumers. Closed markets frustrate all these public interest benefits.

32. Access to the U.S. market through international Section 214 authorizations or Title III licenses may be an appropriate tool to achieve the benefits of competition such as low prices, high quality, and innovation. The benefits U.S. companies would receive by having an outlet for their capital, technology and expertise would be balanced by the same benefits flowing to their foreign counterparts through entry into the U.S. market. Also, access to the U.S. market, as a uniform standard, could be administratively more efficient and less of a burden on the Commission's resources than the drafting of multiple sets of conditions to fit the particular attributes of each foreign market on a case-by-case basis.

33. Therefore, we propose the addition of an effective market entry standard to our public interest analysis of foreign carrier entry applications under Section 214 as a tool to encourage foreign administrations to open their markets to U.S. entities. This, in turn, will eliminate opportunities for foreign entities to engage in conduct that might have anticompetitive effects in the provision of international services or facilities, including undue discrimination or other abuses of bottleneck facilities, and will promote effective global market competition. We also request comment on whether our goals in this proceeding will be furthered by incorporating the effective market access test as an element of our Section 310(b)(4) analysis for Title III common carrier, aeronautical and broadcast license applications.

34. Whatever entry standard we adopt in this proceeding for international Section 214 authorizations will not be an end in itself. It will only be an interim step designed to further the goal of effective competition in the global communications market. Therefore, we expect that, as the trend of liberalization and privatization continues around the world, and more countries permit facilities-based competition for voice and other services, the need for such entry standards will diminish.

B. Section 214 Standard For Entry By Foreign Carriers

1. International Facilities-based Entry By Foreign Carriers

a. Regulated Open Entry Under Section 214

35. Currently our rules do not prohibit foreign-owned or affiliated carriers from acquiring and operating international switched and private line facilities on a common carrier basis in the United States. We have permitted some services by foreign carriers on international routes, including routes where the applicant is affiliated with a foreign carrier. Prior to authorizing entry, we have reviewed the potential effects on competition in the U.S. market. If necessary, we have imposed safeguards to prevent undue discrimination and unfair competition.[26] In our recent facilities-based authorizations to foreign carriers, we found that our nondiscrimination safeguards were sufficient in part either because of the competition and regulation that existed in the foreign carriers' home market, or because the authority granted was limited in scope.

36. We have followed this course to encourage competition

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[26] See TLD Order, 8 FCC Rcd at 109-113.

in the U.S. international services market.[27] Some have questioned, however, whether the benefits of such competition are undermined when new entrants are able to succeed because of privileged access to closed foreign markets.

37. Our experience leads us to believe that an open entry policy, without explicit standards, may not provide sufficient incentive for foreign markets to open. In addition, in light of demands by multinational firms for end-to-end telecommunications services and "one-stop shopping," safeguards may not compensate for the disadvantages U.S. carriers face when competing against a foreign carrier that operates in both the United States and closed foreign markets. The competitive strengths and abilities of individual service providers -- rather than the regulatory structure of markets -- should determine the success of service providers in the global telecommunications market.[28]

b. Effective Market Access

38. We tentatively conclude that we should modify our entry standard for international facilities-based carriers to encourage the formation of a competitive global market. We believe that our standard should permit entry into the U.S. international facilities-based services market by foreign-affiliated carriers where the foreign carriers' markets are open to U.S. carriers. Therefore, we believe that an important element of our proposed public interest test should be effective market access for U.S. carriers in the primary international telecommunications markets served by the carrier desiring entry. This access must exist at the time of entry, or in the near future. We also will consider other factors which we have previously applied under our public interest analysis such as national security; the openness of other telecommunications segments of the foreign carrier's primary market; and the ability and incentive of the foreign carrier to discriminate against unaffiliated U.S. carriers.

39. Initially, we request comment on the scope of this Commission's statutory jurisdiction to consider the availability of effective market access to foreign markets as one factor in

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[27] See TLD Order, 8 FCC Rcd at 108. See also Regulatory Policies and International Telecommunications, CC Docket No. 86-494, Report and Order and Supplemental Notice of Inquiry, 4 FCC Rcd 7387, 7428 (1988)(citing Notice of Inquiry and Proposed Rulemaking, 2 FCC Rcd 1022, 1025 (1987)). See also FTC Communications, Inc., 2 FCC Rcd 6114 (1987) (granting switched service facilities-based authorization to U.S. carrier 14.9 percent of which is owned by company held indirectly by the French government).

[28] See AmericaTel, 9 FCC Rcd at 3996, para. 14.

our public interest analyses under Sections 214 and 310(b)(4) of the Act. Under our authority to regulate foreign commerce in communication by wire and radio,[29] we have examined the degree of market openness for the purpose of ensuring the efficacy of our competition safeguards.[30] In order to ensure compliance with our International Settlements Policy, we have also examined the openness of other markets to determine whether equivalent international private line resale opportunities exist.[31] In this Notice, we seek comment on the scope of our jurisdiction to consider the openness of foreign markets to further the three goals described in Section III.A.

40. We propose to define effective market access as the ability for U.S. carriers, either currently or in the near future, to provide basic, international telecommunications facilities-based services in the primary markets served by the foreign carrier seeking entry. A primary market is one where a carrier has a significant facilities-based presence.[32] We would consider the following factors, none of which would be dispositive, to determine whether effective market access exists: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices, including costallocation rules to prevent cross-subsidization; (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards. In considering these indicators to determine whether effective market access exists, we will not necessarily require that each factor be present in order to make a favorable finding, particularly if there is evidence that the market is fully competitive. Rather, we will look to the arguments of the applicant and commenting

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[29] See Section 1 of the Communications Act of 1934, 47 U.S.C. §151.

[30] See AmericaTel Order, 9 FCC Rcd at 3997-4001; BT/MCI Order, 9 FCC Rcd at 3969.

[31] See ACC Global Corporation, 9 FCC Rcd 6240 (1994); fONOROLA and EMI, 7 FCC Rcd at 7312.

[32] See para. 43, infra.

parties as to the appropriate weight of each factor in a particular market.

41. We do not propose to adopt AT&T's "comparable market access" standard as a method of regulating entry. AT&T would require the Commission to find that competitive opportunities essentially identical to those in the United States are available to U.S. carriers in the home markets of the prospective entrants. Given the varying market and regulatory conditions around the world, it would be impossible to find a situation where essentially identical market access exists. The AT&T test would require that the regulations and market structure of the foreign country mimic those of the United States. Such a strict test would be impossible to meet, and thus would not encourage open markets. We also believe that there are times when public interest factors other than comparable market access might be decisive on the issue of entry. For example, if comparable market access exists for international facilities-based services in a particular country, but all other telecommunications markets are closed to U.S. carriers, the balance of the public interest factors may weigh against granting entry to a carrier from that country. While market entry is an important part of the public interest analysis, we do not share AT&T's view that comparable market access must exist before foreign carrier entry is allowed.

42. We also do not believe it necessary to adopt AT&T's request for cost-based accounting rates as a condition of foreign carrier entry. AT&T proposes that as a prerequisite to entry the foreign carrier should agree that it will within thirty days reduce accounting rates for all U.S. carriers to the lesser of either cost-based levels, or the lowest rate charged by the foreign carrier to other telecommunications entities from any other country. This requirement should not be necessary because we expect accounting rates to drop as a natural consequence of the introduction of effective market access. We propose, however, that the presence of cost-based accounting rates be part of our total public interest analysis to determine whether facilities-based market entry should be allowed.

43. We request comment on the following approach for applying the effective market access element of the public interest test. If a foreign carrier desires to enter the U.S basic international facilities-based market either directly or through affiliation[33] with an authorized U.S. carrier, we would assess whether the primary market, or markets, of the carrier offers effective opportunities to U.S. carriers to compete in the provision of basic, international services and facilities. We recognize that a foreign carrier might operate in several

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[33] See infra Section III.B.2.a. for a discussion of the definition of "affiliation."

geographic markets. Therefore, for this part of the test we will only look at primary markets: those key markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant. A carrier's secondary market would be defined as a market in which it has an ownership interest in a facilities-based carrier, but is not a substantial or dominant carrier, or where insignificant traffic flows exist between the United States and that country.

44. Under this approach, if a U.S. carrier can compete as a facilities-based provider of international basic services in the primary market(s) of the carrier seeking entry, we would find that the carrier has met the effective market access element of our public interest standard. Where a foreign carrier's primary markets are open, even if secondary markets closed, we would find that the market access element has been met.

45. Once we have reviewed the effective market access element of our public interest analysis, we would assess other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market. Such factors could include the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers; the status of the foreign carrier as a government or non-government entity; the general significance of the proposed entry to promotion of competition in global markets; the presence of cost-based accounting rates; and any national security implications. Finally, we would solicit the views of the Executive Branch on the proposed foreign carrier's entry into the U.S. market.

46. We believe the above approach would be the most effective way to promote both global competition and competition in the provision of U.S. international services, with their associated benefits for users. This approach would, in most cases, limit facilities-based competition by new foreign carrier entrants to those cases that affirmatively promote global competition and encourage the opening of foreign markets. We believe that, in the long run, this approach should result in stronger, more equal competition both in the United States, and abroad, because carriers would not have marketing and provisioning advantages resulting from operating both in closed foreign home markets and in the United States.

47. We also believe this approach addresses our goal of removing opportunities for undue discrimination and other conduct that might have an adverse effect on competition. Linking facilities-based entry to effective market access is the surest means of preventing anticompetitive conduct by a foreign carrier.

If other public interest factors weigh in favor of allowing entry, safeguards such as dominant carrier regulation can still be imposed to guard against undue discrimination and anticompetitive conduct.

48. Further, we believe this approach would be the best method of furthering our goal of encouraging foreign governments to liberalize their telecommunications markets. In this respect, two views were presented in response to AT&T's proposed "comparable market access" test. AT&T contends that foreign governments have no incentive to liberalize if the United States does so unilaterally. AT&T argues that these governments might liberalize if given an incentive, i.e., access to the U.S. market by their carriers. On the other hand, several other carriers have argued that, if the U.S. government increases restrictions on U.S. market access, other governments might retaliate with increased restrictions as well.

49. We believe that our proposed public interest standard addresses both AT&T's concern about providing incentives to open, and the other carriers' concerns about inviting retaliation. By having effective market access as the first element of our public interest standard, we are emphasizing that we will recognize and reward carriers from those markets that are liberalizing. At the same time, we are trying to avoid sending a signal that might be misinterpreted as a closing of our markets. Indeed, this proposed approach, unlike AT&T's, purposely does not require "mirror reciprocity" for this reason. We maintain flexibility under this approach to look at all of the public interest factors surrounding entry, and balance the market conditions of the primary markets to see what opportunities are present for U.S. carriers to compete there.[34] Even if a foreign carrier cannot demonstrate that effective market access exists for U.S. carriers in its primary markets, it may still show that other public interest factors warrant its entry into the U.S. market. Thus, we believe the advantages of this flexible approach would offset any disadvantages that might occur by not allowing immediate facilities-based entry by all foreign carriers. Furthermore, we believe this flexible approach will promote the objectives of the Administration's Global Information Infrastructure (GII)

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[34] For example, the Commission traditionally has not been concerned with content-related issues in authorizing the provision of U.S. international common carrier services. These issues, however, may warrant consideration in our international Section 214 public interest analysis as common carriers seek to enter national and global markets for video and audio programming as well as video and audio transmission.

initiative[35] by encouraging competition.

c. Other Matters

50. We do not believe that our goals would be furthered by requiring an effective market access showing when a U.S. carrier acquires an ownership interest in a foreign carrier. If, however, the foreign carrier acquired by the U.S. carrier is a monopoly, or otherwise warrants dominant carrier treatment under Section 63.10 of our rules, we would regulate the U.S. carrier in the same manner as if the foreign carrier itself had entered the U.S. market. That is, we would apply our dominant carrier and other nondiscrimination safeguards to the U.S. carrier in its provision of U.S. international services.[36]

51. Finally, we propose to implement whatever approach we ultimately adopt in this proceeding through the Section 63.01 application process and the Section 63.11 notification process. Section 63.11 of the rules requires carriers to notify the Commission within ninety days of the acquisition of an "affiliation"[37] with a foreign carrier. We would continue to place these notifications on public notice. We propose, however, to change the notification period specified in Section 63.11 from ninety (90) days to thirty (30) days. In addition to using the notification to determine whether a change in regulatory status may be warranted under Section 63.10, we would also use the notification to determine whether further review of the facts surrounding the acquisition is warranted, and, if so, whether the carrier's Section 214 certificates should be designated for hearing. The carrier also would have the option, prior to the acquisition, of seeking a declaratory ruling that such acquisition serves the public interest, convenience and necessity.

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[35] See Vice President Al Gore, Speech at World Telecommunications Development Conference (Mar. 22, 1994)(transcript available at the Federal Communications Commission). One of the goals outlined by the Vice President in his speech before the World Telecommunications Development Conference was to encourage competition as a means of increasing innovation, reliable service, and economic growth. Vice President Gore also emphasized the importance of a flexible, effective regulatory framework that can help ensure the continued openness of the more liberal foreign telecommunications markets, and promote the opening of closed foreign telecommunications markets to competitive entry.

[36] See infra Section III.C.

[37] See infra Section III.B.2.a. for proposed new definition of "affiliation."

2. Definition of Affiliation

a. Affiliation for Purposes of Entry Authorization

52. We propose to apply any entry standard adopted in this rulemaking for international Section 214 applications only to those potential entrants that are "affiliated" with a "foreign carrier."[38] We tentatively conclude that it is not necessary to include within the scope of this rulemaking those potential entrants with foreign owners that do not fall within the definition of a foreign carrier. This is in contrast to Section 310(b) of the Act, which applies to ownership by any foreign entity. We believe that limiting the scope of this rulemaking to foreign carriers should promote development of effective global competition by providing national and global carriers with the flexibility they need to structure their businesses and raise capital from foreign sources other than foreign carriers,[39] while controlling the potential for abuse of market power by certain foreign carriers. We request comment on this approach, particularly about whether it adequately encourages more open markets abroad.

53. In conjunction with its request that we adopt a comparable market access standard, AT&T argues that we should change our definition of affiliation from a control standard to one that treats a U.S. carrier as an affiliate of a foreign carrier when the foreign carrier owns five percent or more of the

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[38] We propose to define "foreign carrier" as we have defined it in Section 63.01(r)(1)(ii) of the rules: "... any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1." We construe this definition of a foreign carrier as we did in International Services. Thus, it includes foreign carriers that provide intercity or local access services or facilities in a foreign country. International Services, 7 FCC Rcd at 7334 n.47.

[39] We also ask infra in Section III.D. whether we should adopt a liberalized application of Section 310(b)(4), as it applies to licensing U.S. common carrier, broadcast and aeronautical radio facilities, which will permit us to recognize foreign countries' efforts to liberalize their telecommunications markets. We note, however, that our discussion regarding identifying foreign carrier affiliations for purposes of authorizing entry under Section 214 is irrelevant for purposes of applying Section 310(b)(4), which is governed by statute.

U.S. carrier.[40] One reason to revise our affiliation standard is that it may not address many of the ways in which foreign carriers seek to serve the U.S. international telecommunications market. For instance, there have been direct acquisitions of U.S. carriers, such as TLD and AmericaTel, joint ventures involving less-than-controlling ownership interests in U.S. carriers, such as the BT/MCI venture, and co-marketing arrangements such as AT&T's WorldPartners Company.

54. We note that, in the International Services proceeding, the Department of Justice (DOJ) commented that a less-than-controlling interest by a foreign carrier in a U.S. carrier could give the foreign carrier the financial incentive to favor its U.S. affiliate. Indeed, DOJ recently alleged in its Complaint in U.S. v. MCI Communications Corporation and BT Forty-Eight Company (NEWCO),[41] that the acquisition of 20 percent of MCI shares by BT may substantially lessen competition in the provision of international telecommunications services between the United States and the United Kingdom.[42] DOJ was particularly concerned with the territorial allocation provision and loss of rights provisions entered into between BT and MCI that would force BT to rely upon its 20 percent investment in MCI as a primary source of revenues from the U.S. telecommunications market.[43]

55. In our Declaratory Ruling regarding the BT/MCI venture, we also found that a less-than-controlling interest could be a source of concern.[44] Thus, in spite of the fact that MCI and BT

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[40] For a more detailed discussion of our current definition of affiliate, see infra para. 65.

[41] U.S. v. MCI Communications Corporation and BT Forty-Eight Company (NEWCO), Case No. 1:94 CV01317 (D.D.C. filed June 15, 1994)(hereinafter cited as U.S. v. MCI). DOJ and the defendants (MCI and NEWCO) stipulated to an entry of a Final Judgment.

[42] See DOJ Competitive Impact Statement filed June 15, 1994 in U.S. v. MCI at 10.

[43] See id. at 11.

[44] In particular, we found that BT's 20 percent interest in MCI, the second largest U.S. long distance carrier, coupled with its participation on MCI's Board of Directors, could provide BT with the incentive both to discriminate in favor of MCI and to influence the corporate decisionmaking process of MCI. In addition, we noted that BT and MCI had jointly created NEWCO (now called "Concert") which, at least initially, would develop and market enhanced service products, which could require access to the basic services network controlled by BT in the United Kingdom. Finally, we noted that BT would be forced to rely on

would not be "affiliated" within the meaning of our current rules, we concluded that certain factors created incentives for BT to favor MCI.

56. We believe that the competitive implications of the BT/MCI transaction, and other joint ventures developing, underscore the inappropriateness of using control as a threshold level of foreign ownership at which an entry standard would apply for foreign carriers. While we recognize that some U.S. carriers may need additional capital to compete worldwide, and may benefit from foreign carrier investment, we are concerned that if a foreign carrier acquires even a less-than-controlling ownership interest in a U.S. carrier, this also may confer on the foreign carrier the incentive to discriminate in favor of the U.S. carrier. Although in many such instances the incentive to discriminate may be minimal, our safeguards may not always be sufficient to limit the potential for undue discrimination (and other competitive advantages resulting from the exercise of market power) that could occur when a foreign carrier has an ownership interest in a U.S. international carrier.

57. We therefore tentatively conclude that a new affiliation standard is needed that will identify those instances of foreign carrier investment that may require review to see if they implicate the public interest goals of this proceeding. Accordingly, for the purposes of establishing an entry standard, we propose to adopt a definition of affiliation that includes cases where a foreign carrier acquires a direct or indirect ownership interest of a certain minimum percentage level, or a controlling interest at any level, in a U.S. carrier. We seek comment on what that level of interest should be. In reaching a decision, we will look at what level of ownership may give the foreign carrier the incentive to discriminate in favor of the U.S. carrier or to engage in other strategic conduct that might have anticompetitive effects. We also are concerned whether the investment may provide the U.S. carrier with other competitive advantages that flow from the exploitation of the foreign affiliate's market power, such as the ability to market its services exclusively in conjunction with those offered by the foreign carrier. Such exclusive arrangements would be of concern at least until we are assured of effective facilities-based competition on the foreign end. We emphasize, however, that whatever minimum level of ownership we adopt is meant only to be a trigger for our entry review, not a bar to entry. As outlined in this Notice, our review will then take into consideration all factors that might weigh in favor of, or against, allowing entry.

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its 20 percent investment in MCI as a primary source of revenues from the U.S. telecommunications market. BT/MCI Order, 9 FCC Rcd at 3967, para. 36.

58. An interest of five percent, as suggested by AT&T, has been found by the Commission to be an appropriate standard of ownership affiliation in other important regulatory areas such as the Telephone Company-Cable Television Cross-Ownership rules.[45] We find, however, that applying an entry standard and competitive safeguards at a five percent investment might unreasonably limit the ability of U.S. carriers to attract foreign investment, and impose unnecessary administrative burdens on potential entrants. We believe that any residual concerns about potential anticompetitive effects at this level of investment can be adequately dealt with through our standard nondiscrimination safeguards that we apply to all U.S. international carriers and through the enforcement process if necessary.

59. A greater than ten percent ownership interest in a U.S. carrier by a foreign carrier may warrant our scrutiny. Analogous precedent from orders issued under the terms of the AT&T Consent Decree and from the Securities and Exchange Commission ("SEC") supports the reasonableness of a ten percent cap. In a blanket waiver granted by the U.S. District Court in United States v. Western Electric Company (AT&T Consent Decree), the Court, with support of the DOJ, permitted the Bell Operating Companies to acquire up to ten percent of foreign telephone companies, subject to certain nondiscrimination conditions. Section 16(a) of the Securities Exchange Act of 1934, as amended ("the Exchange Act"), also is instructive. Section 16(a) provides that an owner of greater than ten percent of the publicly-traded equity securities (other than exempt securities) of a publicly-held company must file periodic ownership reports with the SEC. This level of ownership is thought to give the security holder the position of an insider and the ability to influence the affairs of the company.

60. Alternatively, we request comment on whether a greater than 25 percent ownership interest should be considered affiliation under our rules. This level would be consistent with the Section 310(b)(4) of the Communications Act benchmark for indirect foreign investment in radio facilities in the United States. A greater than twenty-five percent investment would likely be a level of ownership that would give a foreign carrier a large enough stake to have an incentive to discriminate in favor of its U.S. affiliate. However, we are concerned that a 25 percent level could be perceived by U.S. carriers as so high that it would discourage procompetitive foreign investment.

61. We propose that, in addition to a controlling interest

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[45] See Telephone Company-Cable Television Cross-Ownership rules, Section 63.54 - 63.58.

at any level,[46] investment by a foreign carrier in a U.S. international common carrier over a specified threshold will be subject to the entry standard discussed in Section III.B.1, supra. We request comment on whether that threshold level should be set at greater than ten percent, 25 percent, or some other level of capital stock.[47] If a foreign carrier controls a U.S. carrier, or invests more than the specified threshold level in the U.S. carrier, the foreign carrier would be considered affiliated with the U.S. carrier. The affiliated U.S. carrier would then be subject to the entry standard proposed in Section III.B.1. We also request comment on how we should apply our effective market access test in situations where more than one foreign carrier or a foreign carrier consortium has ownership interests in a U.S. carrier.

62. We propose not to include in our definition of affiliation non-equity business relationships between carriers (e.g., where a U.S. carrier is involved in a joint venture with a foreign carrier to manufacture switching equipment). While such relationships between carriers can also provide them with the incentive to favor one another in the exchange of basic services, we tentatively conclude that such incentives are relatively attenuated compared with those that are present with ownership interests. We seek comment on this conclusion.

63. We also tentatively conclude that no foreign carrier entry regulation is required for co-marketing arrangements, such as AT&T's WorldPartners Company, provided they are, both in theory and in practice, nonexclusive[48] (e.g., they do not give the

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[46] We propose to assess control based on Commission precedent under Sections 310(d) and 214(a) of the Act. See International Services, 7 FCC Rcd at 7333, para. 13, n.28.

[47] Our assessment of "capital stock" ownership will be done under the standards developed in Commission case law for determining such ownership.

[48] The nonexclusivity requirement would apply at least until we are assured of effective facilities-based competition on the foreign end. This requirement is grounded in antitrust concerns. Normally, cooperative arrangements between firms in "vertical" situations -- where one firm passes on a service, such as a phone call that originated in a foreign country, to a firm that completes it, such as a telecommunications company in the United States -- create efficiencies and are consistent with antitrust principles. When the upstream company is a monopoly or has "market power," however, the potential exists for discrimination and skewing of competition in the "downstream" market (calls terminating in the United States in the above hypothetical). See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263,

U.S. carrier the exclusive right to provide joint basic services in correspondence with any particular foreign carrier[49]). We conclude, however, that we need to review whether our public interest goals would be served by imposing reporting requirements on U.S. carriers that participate in co-marketing arrangements for the provision of basic global network services. It appears at a minimum that, under Section 43.51 of the Commission's Rules, these types of arrangements require the filing of their co-marketing agreements.

64. Finally, we further propose to reserve the right to review any transaction that involves foreign carrier participation in which unique factors suggest Commission review would be necessary to serve the public interest, even with foreign carrier participation at levels below the investment threshold chosen. We seek comment on all of the above proposals and tentative conclusions.

b. Affiliation for Purposes of Post-Entry Regulation

65. After we have determined that the public interest would be served by permitting a certain foreign carrier to enter the U.S. market, the next step is to determine whether the carrier should be regulated as dominant or nondominant. Part of the decisionmaking process, as established in International Services, is a determination whether the carrier is "affiliated" with a foreign carrier. In that proceeding, we defined a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. We use this definition to classify a U.S. carrier as dominant or nondominant on a particular international route, based on the market power of its foreign affiliate.[50] As the Commission noted, however, the order did not address the question of entry standards for foreign-affiliated entities.

66. In light of our goals, and proposed definition of

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276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). The nonexclusive requirement is designed to mitigate any such discrimination.

[49] See International Services, 7 FCC Rcd at 7333, para. 11.

[50] Under the framework adopted in International Services, we regulate a U.S. international carrier, whether U.S. or foreign-owned, as dominant only on those routes where a foreign affiliate of the carrier has the ability to discriminate in favor of its U.S. affiliate in the provision of services or facilities used to terminate U.S. international traffic. 7 FCC Rcd at 7332-3, para. 10.

affiliation for purposes of regulating entry, we request comment on whether we should revise the definition of affiliation adopted in International Services to conform to the one proposed for entry purposes. One consequence of redefining affiliation at a less-than-controlling interest for purposes of applying dominant carrier regulation is that more carriers would be subject to such regulation. For instance, a U.S. carrier that is currently regulated as nondominant could now be deemed dominant on a particular U.S. international route if the foreign carrier on the other end of the route has, or acquires, a less-than-controlling ownership interest in the U.S. carrier. Likewise, if a U.S. carrier acquires a less-than-controlling interest in a foreign carrier on a particular U.S. international route, that carrier could be deemed dominant on that route.[51] Considering these consequences and issues of administrative simplicity, we ask for comment on whether it is desirable to conform these affiliation definitions for purposes of entry and post-entry regulation.

3. Definition of Facilities-based Carrier

67. Our regulation of international services relies upon a distinction between facilities-based services and resale. However, IDB's petition raises the fundamental question of whether our current rules clearly distinguish between resellers and facilities-based carriers. IDB asserts that recent Commission actions, including our International Resale Policy decision,[52] have caused disputes regarding the definition of a facilities-based carrier. IDB contends we have historically treated a carrier that leases a cable or satellite circuit as a facilities-

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[51] See 47 C.F.R. § 63.10. Although we do not propose to do an effective market access analysis whenever a U.S. carrier acquires a foreign carrier, see supra para. 50, we reiterate that dominant carrier regulation would apply if the foreign carrier acquired is a monopoly carrier, or otherwise warrants dominant carrier treatment under Section 63.10 of our rules. In addition, we propose to impose the same dominant carrier and other nondiscrimination safeguards on the U.S. carrier that we impose on foreign carrier affiliates that we authorize to enter the U.S. market.

[52] Regulation of International Accounting Rates, Phase II First Report and Order, 7 FCC Rcd 559 (1991)(International Resale Policy); see also Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992)(Phase II Order on Reconsideration). To prevent evasion of the settlements process through one-way resale of private lines for the provision of switched services into the United States, we require that applicants seeking authority to resell international private lines for the provision of switched services demonstrate that the country at the other end of the private line affords equivalent resale opportunities.

based carrier, but that our International Resale Policy treats those who operate by leasing private line circuits as resellers. Further, IDB notes that we have imposed upon resellers the Section 63.15(b) circuit-addition reporting requirement[53] that we previously applied only to facilities-based carriers.[54]

68. IDB urges us to adopt a consistent definition of a facilities-based carrier that turns on whether the carrier has acquired the "maximum interest" in a cable or satellite circuit permitted by law. IDB argues that, under such a rule, a carrier would be considered facilities-based in the United States if it purchases an ownership or indefeasible right of user (IRU) interest in a cable or satellite or leases satellite capacity directly from Comsat, because those are the maximum interests allowed under U.S. law. To the extent the Commission seeks to exercise jurisdiction over carriers providing the foreign half-circuit,[55] IDB would have us treat as facilities-based a carrier that directly leases a half-circuit, if that is the maximum interest allowed in that country. IDB believes there is no rational basis for treating carriers that lease capacity from Comsat as facilities-based, while treating carriers as resellers when they lease capacity from foreign carriers with legal monopolies over their countries' telecommunications infrastructures.

69. AT&T opposes IDB's request and characterizes it as an attempt to evade our International Resale Policy. AT&T argues that IDB's proposed "maximum interest" test would vitiate the meaning of a facilities-based carrier. AT&T notes that the International Resale Policy was prompted by a concern that "one-way resale" from countries that do not afford "equivalent" resale opportunities could increase U.S. facilities-based carriers' outpayments, increase their cost of service, and thus harm U.S. customers. IDB's proposed definition would, according to AT&T, legitimize such one-way resale by redefining all resellers overseas as facilities-based and thus exempting them from the equivalency requirement.[56]

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[53] See IDB Petition at 4-5 (citing LDDS Communications, Inc., 8 FCC Rcd 924 (1993); fONOROLA and EMI, 7 FCC Rcd 7312(1992), Order on Recon., 9 FCC Rcd 4066 (1994)).

[54] 47 C.F.R. § 63.15(b) (1994).

[55] IDB disputes the Commission's jurisdiction over foreign half-circuits. See IDB Petition at 9, n.19.

[56] AT&T Comments at 5. AT&T also argues that any doubts as to who should file Section 63.15 reports will be clarified in the rulemaking in CC Docket No. 93-157.

70. MFS supports IDB's rulemaking request. MFS notes that other countries are following U.S. initiatives in liberalizing telecommunications but do not yet permit carriers competing with the established carrier to own their own international transmission circuits. MFS asserts that the Commission's current definition merely prevents U.S. entities from entering overseas markets. MFS believes that IDB's proposed maximum interest definition would allow such competition to flourish. Such entry, according to MFS, would allow U.S. carriers to reduce foreign users' cost of communications service and would pressure existing carriers to reduce their prices.

71. We tentatively conclude that we should continue our current policy of treating a carrier as facilities-based in the United States if it purchases an ownership or IRU interest in a U.S. half-circuit in an international satellite or submarine cable (whether common carrier or noncommon carrier), or if it leases a U.S. half circuit from Comsat or from a noncommon carrier international satellite or submarine cable provider.[57] Our concern with IDB's proposal is that it could undermine our International Resale Policy by permitting carriers to interconnect foreign leased circuits with the U.S. public switched network without demonstrating that the foreign country affords equivalent resale opportunities to U.S. carriers. This would result in an undesirable increase in the settlements deficit. In addition, it could implicitly encourage foreign countries to stop short of creating full facilities-based competition by appearing to legitimize limiting competition to resale of leased circuits. Our current definition avoids this result and is consistent with the public interest goals of this proceeding. We propose to codify that definition in this proceeding. We request comment on our proposal to codify this definition of a U.S. facilities-based carrier.

4. Resale Entry by Foreign Carriers

72. We do not believe there is a need to regulate foreign carrier entry in the U.S. market for resale services as closely as we propose for facilities-based services. There is not as substantial a risk of anticompetitive harm to the global market when we allow foreign carriers into the U.S. international resale market. This risk is greatest when foreign carriers acquire U.S. international facilities. The ability to own and control facilities enables a carrier to manage competition by resellers. A reseller has minimal pricing flexibility when it must rely on a competitor that also supplies the infrastructure and underlying basic services which a reseller must use to provide its own services. In addition, the reseller cannot guarantee the quality

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[57] See, e.g., Phase II Order on Reconsideration, 7 FCC Rcd at 7931.

of its services because the underlying facilities necessary to provide service are not within its control.

73. We also do not believe that applying an effective market access analysis to resellers would do as much to further the liberalization of foreign markets as applying this standard to facilities-based carriers, which generally have significant influence in the liberalization debate within their primary markets. And finally, our experience indicates that our existing entry standards for resellers have encouraged vigorous and effective competition among international resellers, providing significant benefits to users. Under these circumstances, we propose to continue to apply relatively flexible entry requirements to foreign-affiliated resellers, as detailed below.

a. Resale of Switched Services

74. We tentatively conclude that our goals are well served by maintaining our open entry policy for international resale of switched services. We found in International Services that open entry for switched service resale increases the competitiveness of the international market, without resulting in substantial potential for competitive harm..[58] There we established the presumption that even U.S. carriers with foreign-carrier affiliations should be regulated as nondominant in their provision of resold international message telephone service (IMTS). Although we did not adopt an entry standard in International Services, we now tentatively conclude that this presumption equally holds true for entry questions, i.e., that there should be a presumption that there is no competitive harm in permitting unlimited foreign-carrier entry for switched resale, even to affiliated countries. As in International Services, we propose that this be a rebuttable presumption. We invite comments on these tentative conclusions.

b. Resale of Private Lines

75. The resale of private line services raises different market entry concerns from the resale of switched services. We recognized in International Services that there is a greater potential for discrimination in the provisioning of resold private lines. When a U.S. carrier serves a foreign market through the resale of private line service, it must obtain from the foreign carrier the foreign half-circuits and any necessary local or intercity access facilities or services required to terminate U.S. traffic. A foreign carrier that owns or controls telecommunications facilities in both the United States and the destination market may have a competitive advantage over other U.S. carriers. This occurs if the foreign carrier has sufficient

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[58] International Services, 7 FCC Rcd at 7335, para. 31.

market power in the destination country to discriminate among U.S. carriers in the provisioning, pricing or interconnection of the foreign end of the private line.

76. **Resale of Noninterconnected Private Lines.** We currently have an open entry policy for foreign-carrier resale of noninterconnected private lines. Resale of international private lines does not directly implicate the settlements process to the extent such lines are used only to carry non-switched traffic. Given the benefits of competitive provision of noninterconnected private lines, the lack of impact on the settlements deficit, and the availability of safeguards to protect against discrimination in the provisioning of private lines, we propose to adopt a rebuttable presumption that there is no competitive harm in permitting unlimited foreign-carrier entry for noninterconnected private line resale.

77. **Resale of Interconnected Private Lines to Provide Switched Services.** We also propose to continue our current policy on foreign-carrier entry by resale of private lines interconnected to the public switched network. We believe that the equivalency requirement established in our International Resale Policy decision[59] is sufficient to ensure that a foreign monopoly carrier would be unable to exploit its market power with respect to its provision of interconnected private line services. We seek comment, however, on whether we should modify our equivalency requirement to conform to our effective market access standard. We ask for comment on whether a consistent approach to

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[59] See International Resale Policy, 7 FCC Rcd 559. The equivalency determination includes an analysis of whether foreign government regulation (1) permits open entry for U.S.-based carriers into the international resale market; (2) mandates nondiscriminatory treatment of U.S.-based carriers; and (3) authorizes U.S.-based carriers to interconnect international private lines to the PSN at both ends. We have also emphasized that the prices, terms and conditions afforded U.S.-based carriers should be equivalent to those available to foreign-based carriers providing service in the foreign country. We have examined foreign regulatory controls to ensure that they are sufficient to limit the ability of the foreign market facilities-based carrier(s) to favor particular carriers or to cause competitive harm to the resale market generally. Our equivalency determinations have presumed an incentive to impede competition and analyzed foreign-market regulatory controls on the ability of the foreign facilities-based carrier(s) to exercise that incentive successfully. Our International Services order also provides for dominant carrier regulation of an affiliated foreign carrier where it appears that U.S. safeguards are necessary to supplement foreign government safeguards against potential discrimination.

determining equivalency and effective market access would make this standard clearer and more administratively feasible.

78. AT&T has argued in other proceedings that we should adopt cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries.[60] AT&T argues that, without such a requirement, bilateral negotiations to reduce accounting rates will be futile. In support, AT&T states that, as a direct competitor with U.S. carriers, a foreign carrier will have every incentive to maintain above-cost accounting rates to keep the costs of U.S. facilities-based carriers' services higher. AT&T states that to avoid this squeeze by the foreign carrier, U.S. facilities-based carriers will be forced to make the uneconomic decision to use private line facilities, not because they are more efficient or less costly than embedded switched facilities, but to avoid the foreign carrier's above-cost accounting rate. We invite comment on these arguments in this proceeding.

79. As a final matter, to eliminate any confusion over the scope of the prior certification requirement adopted in the International Resale Policy order,[61] we propose to codify the requirement that any carrier that seeks to connect a U.S. half-circuit with a leased, foreign private line half-circuit to provide a switched, basic service must obtain specific Section 214 authority to do so. This requirement applies regardless of whether the carrier owns, leases, or has an IRU interest in the U.S. half-circuit. That is, this requirement applies regardless of whether the carrier is providing service on the U.S. half-circuit as a facilities-based carrier or a reseller.[62] It also applies regardless of whether the carrier is originating traffic in the United States or terminating traffic in the United States. Prior certification on a country-by-country basis is necessary in order to effectively enforce the equivalency policy that we adopted in the International Resale Policy order.[63] We request comment, however, on whether we should permit a private line reseller that has received an initial Section 214 certificate to provide a switched, basic service using a leased foreign half-circuit to add countries without prior certification once we have

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[60] See Supplemental Comments of AT&T, filed October 21, 1994, in BT North America, Inc., File No. I-T-C-93-126, DA 95-120, rel. Jan. 30, 1995 (application for authority under Section 214 of the Act to provide international resale services).

[61] See 7 FCC Rcd at 562, para 24.

[62] See supra Section III.B.3 (proposing to maintain our current definition of a facilities-based carrier).

[63] See 7 FCC Rcd 559 (1991).

adopted an order finding such countries to afford equivalent resale opportunities to U.S. carriers. Commenters should address whether notification to the Commission of additional countries is sufficient or even necessary.

5. Other Forms of Market Entry

80. AT&T requests that we make this rulemaking applicable not only to carriers that hold international facilities-based Section 214 authorizations, but also to all U.S. telecommunications services providers, both domestic and international, including enhanced service providers. As detailed below, we believe that our current rules and policies governing domestic interexchange services, enhanced services, separate satellite systems and other noncommon carrier services do not warrant change. Accordingly, we propose to apply the rules we adopt in this proceeding only to common carriers providing international facilities-based services pursuant to Section 214 of the Act. We request comments on this tentative conclusion.

a. Domestic Interexchange Services

81. Historically, we have not imposed foreign-ownership restrictions on domestic interexchange services, other than the statutory requirements of Section 310 of the Act which limit foreign ownership of common carrier radio facilities. We believe that the public interest goals identified above are well served by this open entry standard for domestic interexchange service. A foreign carrier whose U.S. affiliate provides domestic interexchange service may not use its bottleneck facilities to disadvantage unaffiliated U.S. interexchange carriers where there is no direct interconnection of those facilities to the foreign carrier's U.S. interexchange facilities. We find this fact, combined with the competitive benefits of our longstanding open entry policy for domestic service, and the administrative burden of regulating entry, to outweigh any anticompetitive effects that might occur as a result of permitting foreign carriers to operate in the U.S. domestic market.

b. Enhanced Services

82. As for enhanced services,[64] we have previously found that their deregulation under Title II of the Act has served the public interest. We have not placed any restrictions on the provision of enhanced services by foreign-owned service providers. Continuing to permit foreign carriers to provide enhanced services presents no substantial risk of competitive harm in the market for such services. Therefore, continued deregulation of these services will also serve our goal of

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[64] See 47 C.F.R. § 64.702.

promoting effective global competition.

c. Separate Satellite Systems and Other Noncommon Carriers

83. Finally, for similar reasons we do not propose to apply foreign carrier restrictions to participation in separate satellite systems and other noncommon carrier facilities. Foreign carriers seeking to enter the U.S. market to provide international common carrier facilities-based services would be subject to our proposed effective market entry standard whether they use separate satellites, private submarine cables, or traditional common carrier transmission facilities.

C. Modification of Dominant Carrier and Other Operating Safeguards

84. In light of our tentative conclusions with respect to market entry and affiliation issues, we seek comment on whether we should modify our existing rules for determining the regulatory status (i.e., dominant or nondominant) of U.S. carriers that are affiliated with foreign carriers.[65] We asked whether we should change our definition of affiliation to be consistent with whatever approach is adopted in response to the proposals in Section III.B.2, supra.[66] In this section, we propose to maintain the other aspects of the framework we adopted in International Services for determining the regulatory status of affiliated U.S. carriers. We believe this approach will best serve the goals of this proceeding.

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[65] See International Services, 7 FCC Rcd 7331 (1992); 47 C.F.R. §§ 63.01(r), 63.10, and 63.11. The Commission regulates U.S. international common carriers that are dominant because of foreign affiliations, as dominant only on those routes where their foreign affiliates have the ability to discriminate against unaffiliated U.S. international carriers through the control of bottleneck services and facilities in the foreign market. With respect to those routes for which it is regulated as dominant, an affiliated carrier must: (a) obtain Commission approval before adding (or discontinuing) circuits; (b) file cost-support with its tariffs, which are effective only after 45 days notice (as opposed to 14 days for a nondominant carrier); and (c) report quarterly (as opposed to annually) on traffic and revenues. The rules adopted in International Services did not modify the dominant carrier status, for the provision of certain international services, of AT&T, Comsat or U.S. carriers that provide international service for noncontiguous domestic points. 7 FCC Rcd at 7342, n.2.

[66] See supra para. 66.

85. We take this opportunity, however, to seek comment on whether we should modify the nondiscrimination safeguards that we traditionally apply to carriers regulated as dominant under our International Services decision. Our experience in recent years suggests some of our safeguards can perhaps be better tailored to meet our regulatory concerns. Accordingly, we request comment on whether we should eliminate the requirement that dominant, foreign-affiliated carriers file tariffs on 45 days notice with cost support, and allow them to comply with nondominant carrier rules (i.e., file their tariffs on 14 days notice without cost-support). We propose maintaining our requirements that a carrier obtain prior Commission approval before adding (or discontinuing) circuits on those routes for which the carrier is regulated as dominant and that it file quarterly traffic and revenue reports for those routes. We request specific comment, however, on whether the prior certification requirement is necessary if we adopt the entry approach proposed in this rulemaking.

86. We also propose a new requirement, adopted in the BT/MCI Order, that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign carrier affiliate, including, but not limited to, those it procures on behalf of customers of any joint venture for the provision of U.S. basic or enhanced services in which the U.S. carrier and its foreign carrier affiliate participate. These records should be available to the Commission upon request. We also propose to require that the U.S. carrier obtain a written commitment from its foreign carrier affiliate not to offer or provide, with respect to the provision of basic services, any special concessions to any joint venture for the provision of U.S. basic or enhanced services in which they both participate. We do not propose to change our current rule that prohibits any carrier that has an affiliation with a foreign carrier from agreeing to accept special concessions from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country. This "no special concessions" rule applies regardless of an affiliated carrier's regulatory status.[67] We seek comment on all these proposals and alternatives to these proposals.

87. We further propose to require that any affiliated, facilities-based carrier regulated as dominant on any U.S. international route for the provision of switched services file with the Commission a complete list of the accounting rates that its foreign carrier affiliate maintains with all other countries. We also propose to apply this transparency requirement to affiliated carriers that we regulate as dominant in their provision of switched basic services via resold private lines.

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[67] See 47 C.F.R. § 63.14.

The required list of accounting rates would cover and specify all traffic relations and services of the foreign affiliate. We would require that this filing be made within 60 days of release of a Commission order classifying the carrier as dominant for the provision of switched services. We would also require that the carrier file within 30 days of the end of each calendar quarter any changes in its affiliate's accounting rates agreed to during that quarter. We propose to apply this transparency requirement to all facilities-based carriers and private line resellers now or hereafter classified as dominant for the provision of U.S. international switched services.

88. It has been U.S. policy within the International Telecommunication Union (ITU) and other international fora to promote cost-based, nondiscriminatory and transparent accounting rates. Full disclosure of the foreign carrier's accounting rates will enable us to determine whether there is a noncost-based disparity between the rates maintained by that carrier with U.S. carriers and the rates it maintains with its other foreign correspondents.[68] Here, the information that we propose to require may assist us in monitoring the impact of foreign carrier entry, and self-correspondency, on U.S. accounting rates and whether such entry fosters or impedes progress in reducing accounting rates.

89. We propose not to apply this transparency requirement to a foreign-affiliated carrier that provides switched services on a particular route solely through the resale of U.S. carriers' switched services. Such activity has little or no impact on the level of accounting rates. In addition, affiliated carriers that resell U.S. switched services are presumptively nondominant in any event.[69] Because we have not found the provision of private line service to have a significant impact on the settlements process, we also do not propose to apply this transparency requirement to carriers regulated as dominant solely for the provision of private line services.

90. To the extent we modify our existing dominant carrier safeguards, we propose, with the exception noted for transparent accounting rates, to apply the new safeguards to a U.S. carrier's

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[68] We have directed U.S. carriers to negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends and that eliminate any non-cost-based differences between accounting rates applied by a given foreign administration within its own region and those applied for the United States. Regulation of International Accounting Rates, Phase I First Report and Order, 6 FCC Rcd 3552, 3556 (1991), recon. denied, 7 FCC Rcd 8049 (1992).

[69] See 47 C.F.R. § 63.10(a)(4).

provision of all basic services for which we regulate it as dominant on a particular route. These dominant carrier safeguards, with the exception of the transparency requirement, would thus apply to U.S. carriers considered dominant on particular routes whether for the provision of facilities-based or resale services.

91. We also request comment on AT&T's proposal that we expressly prohibit a foreign carrier or its U.S. affiliate from refiling U.S. originating or terminating traffic, without the consent of the originating and terminating carriers. We request comment on whether an express prohibition is necessary, and how we should define the act of refiling. As for AT&T's request for a condition of proportionate return, since the 1950's, one of the guiding principles in our scrutiny of international traffic relations has been that U.S. carriers "should be permitted to share proportionately in . . . inbound traffic in order to be able to compete effectively."[70] We have consistently applied this principle,[71] waiving it only where required by the public interest, as for example, when a foreign administration lacked technology capable of providing proportionate return.[72] We now propose to codify our proportionate return policy as a rule of general applicability to all carriers.[73] That is, all carriers, whether affiliated or not, must accept only their proportionate share of return traffic from foreign correspondents. Under this rule, we will, of course, continue to grant waivers where necessitated by the public interest.

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[70] Mackay Radio, 19 FCC 1321, 1340 (1954).

[71] See, e.g., Telefonica Larga Distancia Puerto Rico, 8 FCC Rcd 106 (1992); FTC Communications, Inc., 4 FCC Rcd 5633(Com. Car. Bur. 1989); U.S. Sprint, 3 FCC Rcd 1484 (Com. Car. Bur. 1988); American Tel. & Tel. Co., 2 FCC Rcd 6409 (Com. Car. Bur. 1987).

[72] See TRT Telecommunications Corp, 49 FCC2d 1408 (1974); TRT Telecommunications Corp., 46 FCC2d 1042 (1974).

[73] In Regulation of International Accounting Rates, Phase II Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040, 8045 (1992), recon. pending, we requested comment on whether allowing some flexibility in our nondiscriminatory accounting rate, division of tolls, or proportionate return policies might be an appropriate means of achieving lower accounting rates as facilities-based competition is introduced in foreign countries. 7 FCC Rcd at 8046. We do not believe that this outstanding issue detracts from the desirability of codifying proportionate return as a rule of general applicability.

D. Section 310(b)(4) Standard for Radio Licensee Ownership By Foreign Entities

92. International Section 214 authorizations are required for the provision of international basic telecommunications services via any transmission facility on either a resale or facilities basis. In addition, authorizations under Title III of the Act are required for those entities seeking to operate specified classes of radio (wireless) station facilities. As explained in Section II.C. supra, Section 310(b)(4) establishes a 25 percent foreign ownership benchmark for the parent holding company of common carrier, broadcast, and aeronautical fixed and en route ("aeronautical") radio licenses.[74] We ask whether the goals of this proceeding would be served by incorporating the proposed effective market access standard into the public interest determinations under Section 310(b)(4)in situations where the foreign ownership would exceed the 25 percent statutory benchmark. Thus, related to our proposal that effective market access should be a part of the public interest showing under Section 214 of the Act, we also ask whether the same factors should be part of our public interest analysis under Section 310(b)(4) of the Act regarding applications for Title III common carrier and aeronautical fixed and en route radio licenses.[75] We further seek comment on whether the effective market access standard should be incorporated into the public interest

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[74] Section 310(b)(4) states, in pertinent part:

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by --
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> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4) (1982).

[75] We do not propose to apply the affiliation standard discussed in Section III.B.2. because the Section 310(b)(4) foreign ownership benchmark is a statutory requirement not subject to change.

determination under Section 310(b)(4) concerning applications for broadcast licenses. As discussed below, the Commission has traditionally taken a stricter approach to alien ownership determinations under this provision where broadcast licenses are involved given the control over the content of transmissions exercised by broadcasters.

1. Application to Common Carrier Licenses

93. Under the plain language of the Communications Act and its legislative history, the Commission has broad discretion in applying Section 310(b)(4). Indeed, the legislative history of Section 310 itself concerning foreign investment in parent holding companies reflects Congressional concern that rigid restrictions "would probably seriously handicap" U.S. companies engaged in international communications with large interests in foreign countries in connection with their international communications.[76] In addition, the Commission is authorized to consider reciprocal treatment under Section 308 of the Act.[77]

94. In those instances where the Commission has authorized foreign ownership or participation beyond the statutory benchmarks, the Commission has generally considered the level of foreign presence in light of the extent of U.S. presence in other areas (ownership, officers, or directors) relevant to a public interest determination under Section 310(b)(4).[78] In GRC Cablevision, Inc., for example, where the Commission allowed 60 percent alien ownership of a licensee's parent, it specifically noted that the majority of the parent's board of directors was comprised of U.S. citizens and the parent itself was a U.S. corporation. Furthermore, the Common Carrier Bureau noted in

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[76] S. Rep. No. 781, 73 Cong., 2d Sess. 7 (1934).

[77] See 47 U.S.C. § 308(c)(1982), which states "[t]he Commission in granting any license for any station intended or used for commercial communication between the United States ... and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and operation of submarine cables in the United States," approved May 24, 1921 ["Submarine Cable Landing License Act"]." The Submarine Cable Landing License Act states in part that licenses may be withheld if it will assist the United States in securing rights for the landing or operation of cables in foreign countries. See 47 U.S.C. § 35.

[78] See, e.g., GRC Cablevision, Inc., 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974); IDB Communications Group, Inc., 6 FCC Rcd 4652 (Com. Car. Bur. 1991); and Teleport Transmission Holdings, 8 FCC Rcd 3063 (Com. Car. Bur. 1993).

Millicom,[79] where it approved greater than 25 percent alien presence on the board of directors, that 90 percent of the shareholders and a majority of the board were U.S. citizens. More recently, the Common Carrier Bureau approved 65 percent alien ownership in a licensee's parent where there was a 75 percent U.S. presence in the corporate roles of officers and directors.[80] Additionally, the Commission has also considered in its public interest analysis whether the Title III licensees involved are common carrier licensees with no control over the content of the transmissions.[81]

95. Section 310(b)(4) public interest determinations are often required at the same time as Section 214 authorizations when foreign carriers seek to enter the U.S. market, and many of the same policy considerations apply. We ask, therefore, whether a similar approach would be useful in both contexts. It appears that, in the case of common carrier radio licenses generally, such an approach would well serve the goals of this proceeding. Therefore, when an applicant in whom foreign ownership in the parent holding company exceeds the 25 percent benchmark seeks a common carrier radio license, or when a U.S. licensee seeks to increase the level of foreign ownership in its parent holding company beyond the 25 percent benchmark or previously authorized levels of foreign ownership, we ask whether our evaluation of the public interest should consider whether the foreign entity's primary markets pass the effective market access test.

96. Thus, for example, if a foreign entity seeks to invest in the parent holding company of an applicant for authority to provide Personal Communication Services ("PCS"), should we consider whether U.S. companies can provide PCS, or its functional equivalent, in the foreign entity's primary market? We also seek comment on whether, just as with our public interest analysis under Section 214, we should find that our effective market access finding under Section 310(b)(4) is not dispositive of our decision to license a particular entity. For instance, once we have reviewed the effective market access element of our public interest analysis, should we also assess other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market? Such factors in this context could include the state of liberalization in the foreign country's other radio-based service markets, national security, or the competitiveness of the applicant's target market in the United States. Finally, we seek comment on whether, if we do

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[79] See Millicom Inc., 4 FCC Rcd 4846 (1989).

[80] Teleport Transmission Holdings, 8 FCC Rcd at 3065.

[81] See, e.g., Millicom, 4 FCC Rcd at 4847; Teleport Transmission, 8 FCC Rcd at 3064-65.

consider effective market access, this would be a more tailored and predictable application of Section 310(b)(4) that will assist us in encouraging and recognizing foreign countries' efforts to liberalize their communications market.

2. Application to Aeronautical Licenses

97. Section 310(b)(4) of the Act also applies to aeronautical en route and aeronautical fixed radio licenses. Aeronautical en route stations provide air-ground communications for the operational control (flight management) of aircraft by their owners or operators. Communications relate to the safe and efficient operation of aircraft.[82] The vast majority of en route stations are licensed to Aeronautical Radio, Inc. (ARINC).[83]

98. Although there have been no foreign ownership determinations made in this area, it appears there may be benefits in applying the effective market access test to these aeronautical services. With the increasing presence of foreign airlines in U.S. markets and the potential for increased foreign ownership of U.S. airlines, this issue could arise in the near future. Accordingly, we ask whether the effective market access test also should be applied to these aeronautical licensees.

3. Application to Broadcast Licenses

99. Given the potential benefits of considering market access as a factor in our foreign ownership determinations for common carrier and aeronautical licensees, we believe it is appropriate to ask whether a similar approach should be utilized in evaluating broadcast applications that propose indirect alien ownership in excess of the 25 percent statutory benchmark. We note in this context that we have had a traditionally heightened concern for foreign influence over or control of licensees which exercise editorial discretion over the content of their transmissions.

100. The distinction between common carrier and broadcast

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[82] En route stations are the means by which companies satisfy Federal Aviation Administration requirements to maintain reliable communications between each aircraft and its dispatch office, in the case of large airlines, or maintain flight following systems, in the case of small airlines and commercial aircraft operators. Aeronautical fixed stations provide point to point communications pertaining to safety, regularity and economy of flight.

[83] ARINC renders its services on a non-profit basis with costs distributed in proportion to use. Its principal stockholders as well as its principal customers are the U.S. scheduled airlines.

licensees in terms of content control has been the basis for our traditionally disparate treatment of these licensees under Section 310(b)(4). While the Commission has granted applications permitting foreign ownership of a parent holding company of a non-broadcast licensee to exceed 25 percent,[84] the Commission has consistently declined to do so in broadcasting because of a broadcast licensee's ability to control the content of its transmission.[85] Thus, for example, in the GRC Cablevision case, granting a Cable Television Relay Service (CARS) construction permit to an entity whose parent was more than 50 percent foreign owned, the Commission stressed that: "[o]ur action here represents no departure from our traditional policies in regulation of broadcast television. Alien ownership in that medium presents different questions which we will deal with as they rise in concrete situations."[86] The Commission stated that its decision to grant the application notwithstanding the involvement of aliens was based in part on the fact that "the facility in question [would] be used for the relay of broadcast signals and [would] thus be largely passive in operation."[87]

101. Although there is little discussion in the case law of the Commission's consistent concern over alien ownership interests in broadcast station holding companies in excess of 25 percent, the legislative history of 310(b) suggests that alien control of limited broadcast information outlets, particularly in time of war, was a principal consideration in adopting the restrictions. As the court stated in Noe v. FCC: "the dangers from espionage and propaganda disseminated through foreign-owned

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[84] See GRC Cablevision, Inc., 47 F.C.C. 2d 467 (1974)(although references in this case are to Section 310(a), this Section was later recodified as Section 310(b)(4)); see also Teleport Transmission Holding, Inc., 8 FCC Rcd 3063 (Com. Car. Bur. 1993).

[85] See, e.g., Primemedia Broadcasting, Inc., 3 FCC Rcd 4293 (1988).

[86] 47 F.C.C. 2d at 468.

[87] Id. at 468. See also Teleport 8 FCC Rcd at 3065 ("Finally, we note that the two licenses involved are common carrier licenses" and that the licensee "will exercise therefore no control over the content of the transmissions"); GCI Liquidating Trust, 7 FCC Rcd 7641 (1992)("licenses involved are in the point-to-point microwave service where the licensee will exercise no control over content of the transmission"); Millicom Inc., 4 FCC Rcd 4846-47 (1989)("licensed stations provide common carrier service, and as a result, they involve facilities in which the licensee exercises no control over the content of the transmissions").

radio stations in the United States prior to and during war brought about the passage of the Radio Act of 1927 (superseded by the Communications Act of 1934)...."[88]

102. It may be appropriate now to revisit our restrictive approach to alien investment in broadcasting. In contrast to the situation that existed in 1927, there are currently a plethora of broadcast and other mass communications facilities available to the general public. Additionally, even if we incorporate the effective market access standard in our evaluation of broadcast applications, the nature of the case-by-case review conducted under Section 310(b)(4) is such that we retain the discretion to deny particular applications if warranted by the facts of a specific case.

103. Accordingly, we seek comment on whether we should consider effective market access as a factor in Section 310(b)(4) determinations involving broadcast licensees and, if so, what restrictions, if any, we should place on the level or type of interests which aliens would be permitted to hold. We invite commenters to submit any other proposals they believe would be appropriate in defining our Section 310(b)(4) analysis for broadcast licensees, including those which might permit alien control of a licensee's parent company. We emphasize, however, that any such proposals should carefully evaluate the risks and benefits to the public interest, paying particular attention to the fact that control of mass media facilities confers control over the content of widely available broadcast material.

IV. CONCLUSION

104. In this Notice, we tentatively conclude that the public interest requires that we modify our public interest standard for considering foreign carrier applications to enter the U.S. market to provide international facilities-based services. In proposing this standard, we wish to promote three goals: (1) effective competition in the global market for communications services; (2) the prevention of anticompetitive conduct in the provision of international services or facilities; and (3) opening of foreign communications markets. We tentatively conclude that an important element of the public interest standard we would consider is whether there is, currently or in the near future, effective market access to U.S. carriers seeking to provide basic, international telecommunications facilities-based services in the primary markets of the foreign carrier desiring entry. We also propose to continue to consider other factors under our public

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[88] Noe v. FCC, 260 F.2d 739, 741 (D.C. Cir. 1958) citing Letter from the Secretary of the Navy (March 22, 1932), Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 26 (1934).

interest analysis. We suggest two alternative levels of foreign carrier ownership that would trigger this analysis: interests of greater than either 10 percent or 25 percent. We do not propose to change our approach to foreign carrier Section 214 applications for reselling international switched or private line services, or for providing domestic interexchange or enhanced telecommunications services.

105. We also ask whether we should adopt the effective market access test as an important element of the Section 310(b)(4) public interest analysis applicable to foreign entities seeking to acquire an indirect ownership interest in U.S. radio facilities. Thus, when a foreign entity seeks to acquire an indirect ownership interest of more than 25 percent in a common carrier, aeronautical radio or broadcast facility, we seek comment on whether we should find that an important element of the public interest requirement of Section 310(b)(4) has been met if the primary markets of the foreign entity offer effective market access to U.S. carriers to provide the same type of radio-based services as requested in the United States. We ask whether we should also consider other factors under our public interest analysis. We seek comment on all aspects of the proposals described above, and invite additional suggestions on how the Commission may best reach its stated goals.

106. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A, Section II. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice (see Appendix A, Section III), but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1980).

V. ORDERING CLAUSES

107. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on the proposals in this Notice.

108. IT IS FURTHER ORDERED that AT&T's petition for rulemaking is GRANTED IN PART to the extent that we are initiating a rulemaking to address foreign carrier entry into the U.S. market, and denied in all other respects.

109. IT IS FURTHER ORDERED that IDB's petition for rulemaking is GRANTED IN PART to the extent that we clarify our definition of what is a facilities-based carrier and seek comment on our definition, and denied in all other respects.

110. This action is taken pursuant to Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r).

111. For further information on this Notice contact Troy F. Tanner or Susan O'Connell, Attorney-Advisors, Policy and Facilities Branch, Telecommunications Division, International Bureau, (202) 418-1470.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
Procedural Matters

I. Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

II. Initial Regulatory Flexibility Act

A. Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding proposed changes to the Commission's entry standard for foreign carriers desiring to enter the U.S. international telecommunications market, as well as changes to the Commission's public interest standard for foreign entities that seek to acquire an indirect interest in a U.S. common carrier, aeronautical, or broadcast radio license. Comment is also requested on proposed modifications to the Commission's dominant carrier safeguards as well as to other non-discrimination safeguards. Comment is also sought on the Commission's definition of an international facilities-based carrier.

B. Objectives

The Commission seeks to establish standard rules and procedures to regulate foreign entry into the U.S. marketplace in order to promote effective competition and prevent anti-competitive conduct in the market for international communications services, as well as to open foreign communications markets.

C. Legal Basis

The proposed action is authorized under Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r).

D. Reporting, Recordkeeping and Other Compliance Requirements

The actions contained in this Notice of Proposed Rulemaking may affect large and small carriers. We propose to require that dominant, foreign-affiliated carriers maintain or provide certain records regarding their foreign affiliates. These carriers may be required to comply with proposed requirements to file certain

reports, but this is not estimated to be a significant economic burden for these entities.

E. Federal Rules That Overlap, Duplicate or Conflict With These Rules

None.

F. Description, Potential Impact, and Number of Small Entities Involved

To the extent that the proposals discussed in this Notice of Proposed Rulemaking propose to make equity investment by foreign telecommunications carriers in U.S. carriers more difficult, carriers seeking foreign investment greater than the proposed threshold will be adversely affected. These proposals are intended to ensure that U.S. carriers can compete effectively in international markets and to open closed foreign markets. Copies of this Notice will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Notice solicits comment on a variety of alternatives to achieve Commission objectives.

III. Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before March 28, 1995 and reply comments on or before April 28, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

Separate Statement
of
Commissioner James H. Quello

February 7, 1995

Re: Market Entry and Regulation of Foreign-Affiliated Entities
(IB Docket No. 95-22).

I am concerned about the timing and scope of this Notice of Proposed Rule Making. While it is commendable for this Commission to clarify our rules regarding foreign carrier entry in an evolving and increasingly international communications marketplace, I am troubled that we are proposing review of Section 310 of the Communications Act when Congress has targeted foreign ownership as a subject for legislative action. Although I have long maintained that a Commissioner may ask any question of interest in a Notice of Proposed Rule Making, I believe that it is our role to seek and accept guidance from Congress; particularly when a subject is under active consideration in the Legislative Branch of our Federal Government. I believe that it unnecessarily complicates the resolution of this docket to incorporate a review of Section 310 into what could have been more expeditiously handled by a clarification of Section 214, as requested by the parties.

In what I believe is a misguided attempt to reach legal symmetry, this NPRM raises the issue of the application of possible revisions of Section 310 to broadcast facilities. I note, however, that we do not draw a tentative conclusion but, rather, merely seek comment on whether any revisions in our analysis of Section 310, if adopted, should apply to other than telephone carriers.

In clarifying our analysis under our statutory mandate, we must recall the history of the Communications Act. Restrictions on control of broadcast facilities were a bedrock principle of the Communications Act. In addition to legislative intent underlying the Communications Act of 1934, we must be mindful of current legislative activity. Telecommunications reform legislation attracted broad bipartisan support and came very close to passage in the previous Congress. Comprehensive telecommunications legislation has been identified as a priority in this current 104th Congress. Therefore, I believe that the Legislative Branch of our Federal Government, rather than this Commission, properly should take the lead in any reconsideration of Section 310, as they have indicated they are so doing.

In light of these concerns, I specifically ask commenters to address the issue of the appropriate scope of this proceeding.

February 7, 1995

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Market Entry and Regulation of Foreign-affiliated Entities

Global business and global competition require global telecommunications services. By one estimate, the global telecommunications services industry will generate close to $1 trillion in revenue by the end of the decade. Access to foreign markets is therefore critical to the competitiveness of American companies seeking to enter this worldwide telecommunications market. The U.S. communications market is attracting foreign investment and increasing numbers of foreign carriers. Yet a recent study concludes that prohibitive market entry and foreign investment regulations of our trading partners are restricting the ability of our carriers to compete globally.

The Notice of Proposed Rulemaking we adopt today asks fundamental questions about the relevance of asymmetric market conditions to the entry of foreign entities into U.S. communications markets. Our approach is both cautious and well-reasoned. The Notice tentatively proposes to make the openness of a foreign carrier's home markets an explicit factor in our public interest analysis of that carrier's Section 214 application to enter the international services market in the United States. It further asks whether this same market access approach is appropriate when considering requests under section 310(b)(4) to exceed the statutory benchmarks for foreign ownership of radio licensees.

The Notice correctly notes the historical difference in the FCC's treatment of foreign ownership of broadcast radio facilities and common carrier facilities. I support our affirmation of the continued need under our public interest analysis for heightened scrutiny where a foreign entity will exercise editorial control over the content of transmissions.

Market access will not be the only factor in our analysis, nor will it be dispositive. We will continue to consider other public interest factors in making our determinations, such as the promotion of competition in global markets, the presence of cost-based accounting rates and any national security implications.

FCC consideration of foreign market access in these contexts should be welcomed by those countries, like the United Kingdom, that have significantly liberalized their telecommunications markets, and should provide renewed incentive to those markets that are moving, although more slowly, toward liberalization. I believe that this Notice reflects the good faith of the United States by proposing a further liberalization of our telecommunications market and by clarifying our policy on foreign carrier entry.

The Notice lays important groundwork as U.S. companies move increasingly into the global telecommunications services market. A thorough examination of the issue of market access also signals to the world our awareness that open markets are essential components in a Global Information Infrastructure (GII). As Vice President Gore stated in his speech to the World Telecommunications Development Conference in Buenos Aires, Argentina: "The commitment of all nations to enforcing regulatory regimes to build the GII is vital to world development and many global social goals."

I welcome the debate on this extremely important subject.